Analytical report on legislation: RAXEN national focal point Germany

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Analytical Report on Legislation

RAXEN National Focal Point GERMANY

Europäisches Forum für Migrationsstudien / European Forum for Migration Studies (EFMS), Bamberg

BY

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1. Executive Summary

At the end of the year 2002, a total of approximately 7.3 million non-German residents lived in Germany, 59% of whom had been residents of Germany for more than ten years. According to the duration of their residence as well as other factors, these foreign residents are subject to **different residence status**. The question whether foreign nationals live in Germany as EU citizens, asylum seekers, contract workers or ethnic German immigrants ("*Aussiedler*") has far-reaching consequences, both legally and in everyday life. Accordingly, **migration and residence legislation** has a considerable impact on the living situation of each migrant. Apart from considering the non-German population in Germany one must not forget that a large number of **naturalized persons** live in Germany, too.

In spite of rising and diversifying migration inflows, it was not before 1998, when the new government coalition took office, that the traditional defensive self-definition according to which Germany was not a **country of immigration** was abandoned. The following years, in particular the years 2000 to 2002, saw numerous amendments and reforms in migration and foreign resident policy and legislation. This paradigmatic shift resulted, first of all, in the 1999 reform of German **nationality law**. Further steps were marked by the appointment of an Independent Commission on Migration in summer 2000, and the passing of the so-called **Green Card Regulations** in August 2000, which broadened the access of non-German specialists to the labour market in Germany.

In 2002, finally, German parliament passed the new **Migration Law**, which was to take effect as of 1st January 2003. However, as the law has been declared invalid for formal reasons by the Federal Constitutional Court on 18th December 2002, the government introduced the law, which has not been modified, again at the beginning of the year. As so far the bill has only been passed by the *Bundestag* (first chamber of the federal parliament), but not by the *Bundesrat* (second parliamentary chamber representing the federal states), it is up to a mediating committee of both houses of parliament to work out a **compromise** between the government and the opposition. The law aims at a comprehensive reform of foreign resident law. Contrary to the current Foreigners Law, the new law is to include regulations concerning the **gainful employment of non-German residents**, in order to simplify and structure the various legal residence and immigration titles. In addition, the legislation also aims at **fostering integration:** Under the new law, for example, new residents would generally be obliged to participate in integration courses. However, the government migration bill does not comprise explicit anti-discrimination regulations.

Despite the fact that the goal of fostering integration has so far not been incorporated into law, local and state governments have already started to develop **new strategies in integration policy**. These efforts do not only aim at placing more emphasis on integration, but also at defining it as an **inter-departmental task**, e.g. by setting up new cross-cutting administrative departments.

Academic discourse has also dealt with migration and integration matters in great detail, with a wide range of publications discussing various aspects of these topics. These publications comprise, on the one hand, evaluations and **interpretations of official statistical data**, on the other hand **empirical social research** focussing on migration and

integration. The former face the problem that official migration statistics are often insufficient. For example, official statistics do normally only register the nationality of a person, with the effect that naturalised migrants and *Aussiedler* (ethnic German immigrants) are not registered as migrants.

Whereas migration and integration are now generally recognised as relevant and significant issues by politicians and social scientists, discrimination matters have so far not always received the attention they would deserve. Not only is the number of empirical studies quite limited, but also the EU anti-discrimination directives have so far not been implemented into German law.

In February 2002, the Federal Ministry of Justice has presented a **bill for preventing discrimination in civil law** (Civil Law Anti-Discrimination Bill), in order to transfer, at least partly, two EU anti-discrimination directives into national law. The bill, however, only regulates contract law, whereas other areas, such as the membership and participation in trade unions and employers' associations, are to be regulated in a specific anti-discrimination labour law; respective bills have so for not been introduced into parliament. The amendments comprise, firstly, an explicit ban of discrimination based on "race", ethnicity, sex, religion and other beliefs, disability, age or sexual identity, and, secondly, a new **definition** for discrimination, which differentiates between discrimination and admissible forms of distinction, as well as a simplification concerning **burden of proof rules**.

What is more, the federal government has meanwhile shelved its anti-discrimination bill, and so for failed to publish a new legislative proposal. Currently it seems unlikely that the government coalition will present fresh proposals which are as far-reaching as those contained in its original anti-discrimination bill. Brigitte Zypries, the new federal justice minister, has expressed her support for restricting government proposals and excluding the discrimination features religion, belief and age from the government bill. At present, it would be unrealistic to expect an anti-discrimination bill to be passed in 2003.

Even though the issue of **discrimination** has so far not been regulated by one comprehensive anti-discrimination bill, there are, however, several laws containing specific **discrimination bans**.

In the **public sphere**, protection is provided, first and foremost, by Germany's constitution, which stipulates in Art.3 Par.3 **Basic Law** (*Grundgesetz*) that it is illegal to discriminate against anybody because of their sex, descent, race, language, origin, belief, or their religious and political views. In addition, handicapped persons are also protected against discrimination. This article of the constitution applies directly to all state authorities (e.g. public schools and housing authorities), and everybody who charges public officials with discrimination is entitled to take legal action. In addition, there are detailed anti-discrimination regulations for all civil servants. For example, §8 Par.1 **Federal Civil Service Law** (*Bundesbeamtengesetz*) bans all forms of discrimination based on sex, descent, race, religion and religious or political views. Similar directives are to be found in §7 of the **Civil Service Outline Legislation** (*Beamtenrechtsrahmengesetz*) and in §67 **Federal Staff Council Law** (*Bundespersonalvertretungsgesetz*). However, it is obligatory for civil servants to have **German citizenship**; exceptions to this rule are only admissible if there is an urgent public need to recruit non-German civil servants (e.g. for the police force).

The **private sector**, on the other hand, has no comprehensive legal protection against discrimination. In Civil law, in particular §611a ***Bürgerliches Gesetzbuch*** (*BGB = Civil Code*), there are regulations banning all forms of discrimination against employees because of their sex. However, the law comprises, up to now, no regulations against discrimination because of ethnicity. Detailed anti-discrimination regulations are only to be found in **subordinate laws**, for example in insurance supervision, public transport laws, telecommunication customer protection laws, or in the industrial relations law (including individual industrial relations agreements).

Also German criminal law includes regulations which allow the prosecution not only of offences and crimes such as intimidation, grievous bodily harm, arson and murder, which are not necessarily related to the culprit's political motivation, but also of so-called "**communication or propaganda**" offences. Among these crimes are for example "**Using of symbols of anticonstitutional organisations** (e.g. swastika or other Nazi symbols)" (§86a Penal Code), "**incitement of the people**" (§130 Penal Code) or "**glorification of violence**" (§131 Penal Code).

In addition to national legislative projects, Germany has also signed respective **international agreements** and founded an **Institute for Human Rights**, thus underlining its determination to fight racism, xenophobia and discrimination.

To sum up, German law has a number of specific acts and regulations providing protection against discrimination in several areas. However, legislators have so far not passed a comprehensive anti-discrimination act. This is one of the main reasons why the number of court actions dealing with cases of racial discrimination has until now been few and far between. Most of these cases concerned **labour law**, for the main reason that industrial relations laws and agreements provide a more extensive legal protection against discrimination than can be found in other areas. Public interest was greatest for cases which dealt with the question of whether employees are entitled to **wear headscarves** at work.

Whereas more subtle forms of discrimination have up to now not been addressed by legal actions, there have been several court cases dealing with incidents of xenophobic or **racist incidents at the workplace** affecting non-German employees. German labour law entitles employers to dismiss staff that has committed xenophobic or racist infringements on the rights of non-German colleagues (e.g. insults or physical attacks).

On the whole, the number of studies focussing on anti-discrimination legislation is quite limited. Basically, the same is true for discrimination studies in general. Even though there are some studies attempting to measure or quantify discrimination or perceived discrimination, most of these studies are restricted regionally or as far as content is concerned. Up to now, there is also no federal registration and publication of discrimination cases. Notwithstanding the fact that EU anti-discrimination directives call on EU member states to conduct independent surveys concerning discrimination and to publish independent reports by monitoring bodies, the German government has so far not taken respective steps. Consequently, is also impossible to make any generalisations about the scope and development of discrimination in Germany.

This state of affairs attaches additional significance to the large number of **Good-practice initiatives** which aim at preventing discrimination or supporting victims of

discrimination. These initiatives include special information campaigns for migrants, public relations work as well as **counselling and legal advice for victims of discrimination**. There are also several German lawyers who support victims of xenophobic violence by offering legal assistance in order to safe-guard victims' rights.

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3. Glossary[1]

Migration: Migration refers to individuals or groups relocating over socially significant distances for the purpose of changing their main sphere of life and comprises both migration inflows and outflows. Relocations that also involve the crossing of national borders are the main characteristic of international migration (cross-border migration). In the following, we will use migration in the sense of cross-border migration (migration flows across German national borders).

Migrants / migration inflows: Persons relocating across national borders and moving their main sphere of life to Germany. Under this definition, *Spätaussiedler* (ethnic German immigrants) are also categorised as migrants.

Non-Germans: Persons who do not hold German nationality.

***(Spät-) Aussiedler*:** Ethnic German immigrants who are recognised as German nationals according to §4 Par.3 S.1 Federal Displaced Persons Act (*BVFG*) and Art. 116 Basic Law (German constitution). The legal requirements are that they are German nationals or of German descent, living in one of the areas recognised by the *BFVG* as former German settlement areas. Under the 1993 Law on Resolving Long-term Effects of World War II (*Kriegsfolgenbereinigungsgesetz*), most of these settlement areas are territories within the former Soviet Union. The group of ethnic German immigrants can be differentiated according to the date of their emigration: German minority members migrating to the Federal Republic of Germany between 1950 and 1st January 1993 are referred to as *Aussiedler*, whereas later arrivals are categorised as *Spät-Aussiedler*.

First-generation migrants: Migrants who entered Germany after growing up / being socialised to a large extent in their country of origin. This category includes all nationalities.

Second-generation migrants: Migrants' children who were born and grew up in Germany, or have at least completed the larger part of their school education in Germany.

"Autochthonous" Germans: Indigenous persons; German nationals without a migratory background. This category does not comprise *Aussiedler* (ethnic German immigrants) and naturalized persons.

Refugees: Convention and civil-war refugees who are granted residence in Germany according to international law, or for humanitarian and political reasons.

Recognized asylum seekers: Persons who have been recognised as entitled to political asylum in Germany because they were subject to political persecution in their home countries. Under German law, these persons receive a more secure residence status than refugees.

Asylum applicants / seekers: Persons having submitted a petition for political asylum in Germany, with their application still pending.

[1] It has to be noted that many of the terms employed here lack a clear legal definition.

Discrimination: Unjustified unequal treatment of an individual or group of people on the grounds of certain negatively evaluated group characteristics (for example ethnicity, sex, age).

Direct discrimination: "A direct discrimination exists when a person is treated, has been treated or would be treated in a less favourable way than another person in a comparable situation on the basis of one feature listed in §319a section 1 BGB[2]" [own translation] (§319b Abs.1 BGB).[3]

Indirect discrimination: Indirect discrimination exists when seemingly neutral regulations, criteria or proceedings might lead to unfair treatment of a person, which is based on one or several features listed in §319a Section 1 BGB (Civil Code), if the regulations, criteria or proceedings in question further a legitimate request and the means are appropriate and necessary to grant this request" [own translation] (§319b Abs.2 BGB).[4]

Individual discrimination: All kinds of individual behaviour leading to unfair treatment on the grounds of certain negatively evaluated group characteristics (for example ethnicity, sex, age).

Institutional discrimination: Regulations or institutional / administrative practices implying to the unequal treatment (positive or negative discrimination) of a particular group with certain negatively evaluated group characteristics (for example ethnicity, sex, age) in relation to another group.

Perceived discrimination: any behaviour or practice on the part of an individual or organisation that is perceived as discrimination, independently of the fact if actual discrimination has occurred or not.

[2] According to §319a BGB nobody must be directly or indirectly discriminated or pestered on the basis of "race", ethnic origin, sex, religion or belief, handicap, age or sexual identity

[3] In the course of the implementation of the EU anti-discrimination directives into German law, it was planned to add some sections in the BGB. Until now, the quoted §319a-e is not in force.

[4] In our view, it is important to mention another special case of indirect discrimination: **discrimination in the form of lack of educational support**. It is one of the main responsibilities of educational institutions to support disadvantaged groups. Consequently, equal treatment does not inevitably lead to equal opportunities. On the contrary, in some cases it is necessary to offer additional support in order to level the playing field in the first place.

4. Introduction

The aim of this analytical study on legislation is to provide an overview of legal regulations concerning integration, migration and, in particular, anti-discrimination. Apart from laws and government decrees, it is also vital in this context to analyse the implementation and actual effects of these legal regulations.

This report comprises the following three main parts: First, we will provide some background information on different groups of migrants and give a short summary of current legislation as well as immigration and integration policy. The second part focuses on anti-discrimination legislation in Germany. The third part analyses the question of how (and if) legal regulations have been implemented and what their actual impact on discrimination is.

Within these three parts, we will always begin by describing the current situation. This description if followed by an analysis of recent research in this area, summarising important studies and pointing out the need for further studies or for improving the quality of statistical data.

Another feature of our report will be an outline of Good-Practice initiatives. These initiatives organise in order to expand anti-discrimination legislation and support victims of discrimination. The last part of the report contains a summary and recommendations derived from the analytical study.

As can be gathered from the structure of our report, we do not define anti-discrimination as explicit anti-discrimination legislation only. On the contrary, legal regulations concerning migration and integration do also have a significant impact on discrimination. Furthermore, good-practice initiatives as described in Chapter 8 have to be regarded as a part of anti-discrimination measures, too.

In this report, we will use the term ‘discrimination’ as it has been defined by the parliamentary bill for a German anti-discrimination law. This definition is based on respective EU directives. As far as statistics or studies resort to other definitions, we will note the differences in respective chapters.

5. Background information

5.1. NON-GERMAN POPULATION[5]

At the end of 2002 about 7.3 million people in total lived in Germany with a foreign nationality. This amounts to a share of 8.9% of the total population (c.f. table 1).

About a quarter of the foreigners (about 1.862 million people) come from a member state of the European Union, about a third of them Italians. 26% are Turkish nationals and about 14.5% had the nationality of one of the succession states of Ex-Yugoslavia (for more information see table 2).

59% of all non-Germans have been living in Germany for more than ten years. With regard to non-German employees and their families from former recruiting states this rate is even higher: 71.8% of the Turks, 76.4% of the Greek, 76.2 of the Italians and 78% of the Spanish people have been living in Germany for ten years or longer. Among the 7.3 million non-Germans 1.532 million (about 21%) were born in Germany; among the non-Germans under 18 years old the proportion of people who were born in Germany is more than two thirds (68.2%). This is also reflected in the residence status of the non-German population (c.f. table 3).

Apart from considering the non-German population in Germany one must not forget that a large number of naturalized persons live in Germany, too. Looking at the naturalization figures makes clear that the number of migrants who naturalized between 1995 and 2002 has more than doubled (c.f. table 4). This development might also have been accelerated by the *Law on the Reform of the Citizenship Bill* form July 15, 1999 (in force since January 1, 2000) which makes it easier for migrants to obtain the German nationality.

5.2. MIGRATION FLOWS

Over the last ten years, migration flows to and from Germany have been influenced by several factors. One important factor was the **fall of the "iron curtain**", which allowed migration outflows from the former Eastern-European bloc. As for Germany, it has led to an increase in migration inflows of ethnic German immigrants ("*Aussiedler*") and asylum applicants from Eastern Europe. Secondly, the **civil wars** in former Yugoslavia resulted in considerable migration inflows of war and civil-war refugees, especially in the early 1990s. Thirdly, labour migration from neighbouring states, particularly Poland and the Czech Republic, has increased, too. As for migration flows to and from Poland, a distinct culture of "commuter migration" has developed, i.e. Polish nationals enter Germany for a limited period of time in order to seek temporary work. In view of the planned expansion of the European Union toward the east, Germany will be in the centre of future migration flows involving Eastern-European nationals.

[5] Detailed data and facts on the situation of foreigners can be found at www.integrationsbeauftragte.de/daten/index.stm.

GROUPS OF MIGRANTS

Groups of migrants can be differentiated, firstly, according to their legal status on entering Germany, and secondly, according to their residence title. These migration and residence regulations have a crucial impact on the living situation of migrants. For each migrant, it makes a huge difference whether he or she has entered Germany as an asylum seeker, contract worker or ethnic German immigrant (”Aussiedler”). In the following, we will outline the following **types of migration**:

- EU-internal migration
- labour migration
- asylum seekers and quota refugees
- ethnic German immigrant (”Aussiedler”).[6]

EU-INTERNAL MIGRATION

According to EU regulations (EEC Residence Regulations, as of 31st January 1980; EC Decree on Freedom of Movement, as of 17th July 1997) EU nationals enjoy freedom of movement within the European Union, provided certain requirements are given. First and foremost, gainfully employed persons (employees, self-employed persons and service providers) enjoy this privilege. In addition, spouses, direct descendants (children and grandchildren younger than 21 years) as well as parents and grandparents can accompany EU migrants, provided that the latter is able to provide for the maintenance of his or her family members. Europe's development from an economic community to a more deeply integrated European Union has given EU nationals and their family members the right to free movement within the EU, even if their migration to another EU-country is not economically motivated (EC Decree on Freedom of Movement, as of 17th July 1997). In 2001, a total of 120,590 EU citizens migrated to Germany. However, migration outflows of EU citizens leaving Germany amounted to nearly the same number of people (120,408). Consequently, there was no significant increase in EU citizens who are residents of Germany (cf. table 6).

LABOUR MIGRATION

On principle, nationals of non-EU member states or other states participating in the EEA (European Economic Area) are not entitled to enter Germany for the sake of taking up gainful employment. However, there are some exceptions, as outlined in the **Decree on Exceptions to the Ban on Allocating Foreign Labour**

(*Anwerbestoppausnahmeverordnung - ASAV*[7]). It is the goal of this decree to provide a legal channel for migrants from Eastern Europe and thus prevent illegal immigration. In

[6] In addition to these types of migration, the following groups also have to be mentioned: Family and spouse migration of third-country nationals, migration inflows of Jews from the territories of the former Soviet Union, war, civil-war and de-facto refugees, non-German university students. Further details on migration flows can be found on the following website:
www.integrationsbeauftragte.de/publikationen/migration2001.pdf.

[7] According to §9, the following nationalities are exempted from the recruitment ban: nationals of EFTA states, the USA, Canada, Israel, Australia, New Zealand, Japan and small European states. According to §§2 to 5, the following professions are also exempted: contract workers, language teachers, specialist chefs, scientists, social workers and clergy for foreign nationals, nursing staff from Eastern European countries as

addition, the programme helps to compensate for the labour shortage in some sectors of the German economy.

Under these regulations, Eastern European labour, especially from Poland and the Czech Republic, has been given an opportunity to take up employment in Germany. The majority of these labour migrants works as seasonal or contract workers. In 2001, the number of allocations of non-German seasonal workers amounted to 254,000, the number of non-German contract workers to 47,000. In addition, the passing of the so-called Green-Card regulations has opened up a new channel for migration inflows of **IT experts**. Under these rules, non-German information technology experts (who are not citizens of countries participating in the EEA) can be employed in Germany for a period of up to five years. Work permits can also be allocated to non-German graduates of German universities and colleges who take up employment after graduation. Up to the end of December 2002, a total of 13,373 work and residence permits (so-called "green cards") has been granted to non-German IT specialists, most of them being nationals of India, Romania and Russia.

Foreign nationals that are residents of Germany and want to take up gainful employment have to apply for **work authorisation**, with the following groups being exempted from this obligation: EU nationals and citizens of EEA member states and persons holding a residence entitlement or an unlimited residence permit. Work authorisation can be granted in two forms: firstly, in the form of a work permit in cases where job vacancies cannot be filled by German workers (or other European labour with a comparable legal status); secondly in the form of a work entitlement, which can be granted on condition that non-German residents have been legally employed in Germany for at least five years. Work permits can be temporary or limited to certain sectors of the economy. Work entitlements, on the other hand, are generally granted for an unlimited period of time.

ASYLUM SEEKERS AND REFUGEES UNDER THE GENEVA CONVENTION

According to Art.16a Basic Law, non-Germans subject to political persecution have the constitutional right to asylum in Germany. Persons recognised as entitled to political asylum are granted an unlimited residence permit. In 2002, a total of 2,397 applicants were recognised as entitled to asylum (recognition rate: 1.8%; c.f. table 7).

In addition to the right to political asylum according to Art. 16a Basic Law, there is also the possibility of granting what is commonly referred to as the "little asylum" ("kleines Asyl") according to §51 Par.1 Foreigners Act (*Ausländergesetz*), based on the Geneva Convention for Refugees (Art.33). Persons recognised as convention refugees are granted a residence authorisation which is limited to a period of two years. This period can be extended if the persecution risk persists. In 2002, a total of 4,130 persons were recognised as protected against deportation. This equals a quota of 3.2%, in relation to all decisions passed by the Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) (c.f. table 7).

In addition, §53 Foreigners Act requires that persons are also **protected against deportation** if they are threatened by torture, capital punishment, inhuman punishment or other imminent dangers to life and limb or to their freedom. These foreign nationals can

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well as artists and performers. Further exceptions exist for highly qualified specialists whose employment is in the national interest.

be granted a **limited toleration certificate**. Once this period of toleration expires, these persons are under a legal obligation to leave the country. If repatriation is not admissible, for the reasons stated above, toleration certificates can be extended. In 2002, 1,598 persons were recognised as protected against deportation according to §53 Foreigners Act (a quota of 1.2%) (c.f. table 7).

The last two groups are thus legally protected against deportation, but their **residence status is relatively insecure**. Furthermore, they face restrictions in labour market access (a one-year waiting period and a subordinate status in comparison to EEA nationals).

The number of asylum seekers reached its peak in 1992, with almost 440,000 asylum applications, and has continuously decreased ever since. In 2002, the total of applications amounted to 71,127 (c.f. table 8).

ETHNIC GERMAN IMMIGRANTS (AUSSIEDLER)

Under §4 Par.3 *BVFG* (Federal Law on Displaced Persons), *Aussiedler* are legally considered as **Germans** according to Art.116 Basic Law. The legal requirements are that they are German nationals or of German descent, living in one of the areas recognised in the *BFVG* as German settlement areas. Under the 1993 Law on Resolving Long-term Effects of World War II (*Kriegsfolgenbereinigungsgesetz*), most *Aussiedler* are former residents of territories within the former Soviet Union. In 1993, a **quota** was imposed on migration inflows of *Aussiedler* (following an amendment of the BFVG and a federal law on debt reduction, as of 22nd Dec. 1999). Since then, the Federal Administrative Office (*Bundesverwaltungsamt*) responsible for the admission of *Aussiedler* is not entitled to issue more entry permits than were granted in 1998 (i.e. a total of 103,080 persons, including applicants and other family members).

Due to the rising number **inter-ethnic marriages**, the ration between *Aussiedler* and their accompanying family members has been reversed: from slightly more than 77% in 1993, to about 22% in 2001. Consequently, the great majority of entries today are accompanying non-German family members. On arrival in Germany, they are also entitled to receive German citizenship[8] and have the same legal entitlements as *Aussiedler* themselves. In 2002, approximately 91,500 persons entered Germany as *Aussiedler* (c.f. table 9). Since 1950, respective inflows of *Aussiedler* and accompanying family members have amounted to more than 4.2. million persons.

5.3. SHORT OVERVIEW OF CURRENT LEGISLATION AND POLICY ON IMMIGRATION AND INTEGRATION

Despite the continuously rising and permanently more diversifying immigration Germany stuck to the defensive self-characterization that it is no country of immigration until the change of government in 1998. Only the new government coalition faced the new social reality of immigration and introduced a **new era in migration policy**. As a consequence there have been several modifications of the migration and foreigners policies and

[8] On receiving their entry certificate, *Aussiedler* and accompanying family members (spouses and children) are automatically granted German citizenship. This amendment of nationality law (§7 *StAG*), which took effect as of 1st August 1999, has exempted this group from regular naturalisation procedures.

legislation especially from 2000 to 2002. This step has also been assisted by the **demographical development** of Germany as well as by a diagnosed **lack of skilled workforce** in certain sectors of the labour market.

This paradigmatic shift resulted, first of all, in the 1999 reform of German **nationality law**.[9]

Further steps were marked by the appointment of an Independent Commission on Migration in summer 2000, and by several amendments to various acts and decrees, which all aimed at fostering the integration of migrants:

- **Foreigners Act** (*Ausländergesetz*): As of 1st June 2000, amendments to Germany's Foreigners Act (§19 *AuslG*) have extended residence entitlements of non-German spouses.[10]

[9] The new Citizenship and Nationality Act (15th July 1999), which took effect as of 1st January 2000, includes the following main amendments:
Acquisition of German citizenship by birth: As of 1st January 2002, children who are born in Germany to foreign nationals will receive German citizenship when one of the respective child's parents has resided lawfully in Germany for at least eight years and holds entitlement to residence or has had an unlimited residence permit for at least three years. This amendment substantially changes the traditional principle of descent ("***ius sanguinis*"**) by introducing the principle of **"*ius soli*"** for the majority of children born to migrants in Germany. In cases where children acquire dual nationality, i.e. German nationality and that of their parents, they will have to decide within five years of turning 18 - in other words, before their 23rd birthday - whether they want to retain their German citizenship or their other citizenship. They must opt for one of their two nationalities (which is why this is called the **requirement to opt**): In the event that they declare they want to retain their foreign citizenship, they lose their German citizenship. This is also the case when they do not make any statement to the authorities before their 23rd birthday. Should the respective individuals decide to keep their German citizenship, they have to provide proof before their 23rd birthday that they have renounced their other citizenship. **Exceptions** are possible, particularly when renouncement of the other citizenship is not possible or would be unreasonable.
Transitional provisions for children: In §40b of the new nationality act, a temporary entitlement to naturalisation (limited until 31st December 2000) has been created for children born to foreign residents before 1st January 2000, provided they fulfil the conditions under the principle of "ius soli" taking effect as of 1st January 2000. These cases are also governed by the requirement to opt when these children turn 18. On 24th January 2001, the Federal Interior Ministry has introduced a bill into parliament to amend §40b of the nationality act. The aim of the legislation was to extend the transitional provisions outlined above for another twelve months, i.e. until 31st December 2002, and to lower the administrative fee charged by naturalisation authorities. However, the bill was rejected by the *Bundesrat*, the upper house of parliament, and could therefore not take effect.
Entitlement to naturalization under the Foreigners Act: Before the new legislation took effect, foreign nationals were granted entitlement to naturalization only after 15 years of residence in Germany. Now, a foreign national is entitled to naturalization after lawfully residing in Germany for eight years if he or she meets the following requirements: He is in possession of a residence permit or the right of unlimited residence, professes loyalty to the free democratic order laid down by Germany's constitution and has not been involved in any activities that are hostile to the constitution. In addition, applicants must not have a criminal record, have to be able to support himself and dependent family members without the help of welfare benefits or unemployment assistance and, finally, have to have an adequate command of the German language.

[10] According to the amendment, non-German spouses who separate from their husband or wife can be granted their **own residence title** after only 2 years, as compared to 4 years under previous rules (§19 Par.1 No.1 *AuslG*). In addition, **hardship regulations** have been expanded to the effect that separate residence titles can in some cases be granted even before the two-year waiting period has expired. Residence permits can thus also be granted in cases where spouses infringe on the rights of theirs partners (or children), and respective persons can therefore not be expected to continue living together with their spouse or parent. This amendment has also been incorporated into the new Migration Law (§31 Residence Law).

- **Work Permit Directive** (*Arbeitsgenehmigungsverordnung*): Regulations concerning labour market access for asylum seekers, civil-war refugees and foreign residents with a toleration certificate have been amended by the following two directives: First Directive Amending the Work Permit Directive (8th December 2000), and Second Directive Amending the Work Permit Directive (24th July 2001).[11]
- **Life Partnership Act** (*Lebenspartnerschaftsgesetz*): The new Life Partnership Act (*LPartG*) has been promulgated on 22nd February 2001, taking effect as of 1st August 2001. In addition to general regulations on same-sex partnerships, it also comprises amendments to Germany's Foreigners Act (*AuslG*), granting equal rights to non-German partners who have their partnership officially registered. In future, **registered non-German partners** will be **equal** to non-German husbands or wives in terms of immigration and residence titles (insertion of new §§ 27a and 29 Par.4 into Foreigners Act).
- **Education Grant Act** (*Erziehungsgeldgesetz*): Under the 3rd amendment to the Federal Education Grant Act (§1 Par.6 Sent.2 No.2 and 3 *BerzGG*), dated 12th October 2000 and taking effect as of 1st January 2001, non-German parents will have improved access to education grants for their children. In future, entitlements will be extended to persons finally recognised as entitled to political asylum (according to Art.16a Basic Law) or as quota refugees (according to §51 Abs.1 *AuslG*).
- **Federal Education and Training Assistance Act** (*Bundesausbildungsförderungsgesetz - BAföG*): Under amendments taking effect on 1st April 2001, the Federal Education and Training Assistance Act (§8 Par.1 No.7 *BAföG*) now includes **extended entitlements** for education and training assistance. Non-German residents who are protected against deportation (according to §51 Par.1 *AuslG*) and non-German spouses (§8 Par.1 No.7 *BafögG*) are now also entitled to education and training assistance.

Particularly to be mentioned is also the passing of the so-called **Green Card Regulations** in August 2000, which broadened the access of non-German specialists to the labour market in Germany.

[11] The first amendment repealed an earlier directive by the Federal Labour Ministry (the so-called "Clever-Directive" of May 1997), which had prevented the Federal Labour Office from granting work permits to asylum seekers, civil-war refugees and foreign residents with a toleration certificate if they had entered Germany after 15th May 1997. In future, respective persons can be granted a **work permit** after a one-year waiting period if there are no German or non-German (with a prior legal entitlement) applicants for a particular job vacancy. Similarly, a one-year waiting period has also been introduced for non-Germans who, as spouses or children of a foreign resident, have been granted a limited residence permit or allowance; under previous regulations, these residents could only be granted work permits after a four-year waiting period. The second amendment has extended the rules for easier labour market access (as described above) to foreign residents' **registered life partners**, provided they have been granted a limited residence permit or allowance. Foreign residents with a residence authorisation, e.g. war and civil-war refugees, will in future have immediate labour market access without any waiting period, but authorities still have to ensure that there are no other applicants with prior legal entitlement. In a further amendment concerning work permits for foreign residents, labour offices no longer have to carry out repeated **prior entitlement checks** for non-German labour who have been employed by the same company for at least one year and apply for an extension of their work permit.

In 2002, finally, German parliament passed the new **Migration Law**, which was to take effect as of 1st January 2003. However, as the law has been declared invalid for formal reasons by the Federal Constitutional Court on 18th December 2002, the government introduced the law, which has not been modified, again at the beginning of the year. As the bill was passed only by the Bundestag and not by the Bundesrat, it is up to a mediating committee of both houses of parliament to work out a compromise between the government and the opposition. The law aims at a comprehensive reform of foreign resident law. Contrary to the current Foreigners Law, the new law is to include regulations concerning the **gainful employment of non-German residents**, in order to simplify and structure the various legal residence and immigration titles. In addition, the legislation also aims at **fostering integration**. Under the new law, for example, new residents would generally be obliged to participate in integration courses. Several commentators have criticised that the official definition of integration policy does not include anti-discrimination measures (cf. Addy 2003, 4).

On the whole, the passing of the Immigration Law has been **welcomed by a broad majority of organisations**, including trade unions, employers' associations, churches and charitable organisations, even though some of planned regulations have met with **criticism**. Human rights and refugee organisations, for example, have welcomed the law's extended protection for asylum seekers subject to non-governmental and gender-specific persecution, but also emphasised that some gaps would still remain in the protection of refugees.[12]

Despite the fact that the goal of fostering integration has so far not been incorporated into law, local and state governments have already started to develop **new strategies in integration policy**. A number of cities try in various ways to integrate the topics of integration and migration in municipal policy development. As an example the "Intercultural Office Darmstadt", the "Office for intercultural cooperation" in Munich, the "citizen and integration office" in Wiesbaden, the "Department for multicultural affairs" in Bonn and the "Office for multicultural affairs" in Frankfurt am Main [own translations] can be mentioned (for further details see Bosswick/Will 2002; PUBDE0041). What all these initiatives have in common is that they regard integration policy as a multi-disciplinary task which entails the cooperation of several different sectors. For example, integration policy is in many ways linked to education and health policy. Another example would be that at the interface between integration and labour market policy, a multi-disciplinary approach would entail initiating and coordinating joint projects, setting up cross-departmental panels (including e.g. employers, representatives of vocational schools, job centres, foreign resident authorities etc.) as well as the intercultural opening of administrations.

Beside approaches to include integration in municipal and district policy making, one can also see first efforts by **the federal states** to develop systematic concepts for the social integration and administrative networking, such as the integration concept of the state government of Schleswig-Holstein, "which, beside gaining an overview on already existing offers, outlines a working programme aiming at all migrant groups and trying to link already existing offers and funding institutions" [own translation] (Beauftragte der Bundesregierung für Ausländerfragen 2002, 39; PUBDE0096). In Bavaria, a working group with representatives of various ministries has been established, publishing a

[12] For further information on the migration bill, cf. Chapter 12.3 in the appendix.

Report on the Situation of Non-Germans in Bavaria. This report should serve as a basis for the development of a more efficient integration policy.

5.4. RELATED RESEARCH

Migration and integration research has developed into an important field of study, with a large number of research projects in progress. As for migration flows to and from Germany, the annual Migration Report published by the Federal Government´s Commissioner for Foreigners´ Issues is a major source of information (2001; PUBDE0474).[13] Data on non-German residents, e.g. their nationality and age-structure, are compiled in the federal government Report on the Situation of Foreign Residents in the Federal Republic of Germany (Federal Government´s Commissioner for Foreigners´ Issues; PUBDE0012). In addition, the latter also comprises a summary of recent political developments concerning the legal situation of non-German residents.

As for integration, the main sources are evaluations of official statistics (cf. above) and a number of social-science research projects (cf. e.g. Bundesministerium für Arbeit und Sozial-ordnung (Federal Ministry of Labour and Social Affairs), 2002; 1B0030). Studies focussing on second-generation migrants are especially worth mentioning in this context (cf. e.g. Heckmann/Lederer/Worbs, 2001; PUBDE0086; Straßburger 2001; 3B0010). These studies draw the conclusion that integration is a multi-generational process; therefore evaluations about whether integration processes have been successful (or failed) should not be drawn on the basis of first-generation migrants, but rather migrants of the second or third generation.

5.5. GAP ANALYSIS

Evaluations of the situation of Germany's non-German residents are based on official statistics on foreign residents. One has to bear in mind that these statistics employ a legal definition of foreign resident instead of using the term migrant (as defined above). Consequently, official statistics register non-German residents that have just migrated to Germany as well as descendants of non-German residents who have been born in the country and should therefore not be classified as migrants. Conversely, official statistics do neither register ethnic German immigrants (*Aussiedler*) nor naturalized citizens. This state of affairs is highly problematic, especially when the data is used as a basis for evaluating whether integration processes have been successful. On the one hand, integration problems are covered up by the fact that *Aussiedler*, who often face the same integration obstacles as non-German immigrants, are excluded from the statistics. On the other hand, successful integration processes cannot be reconstructed in cases where migrants have been naturalized and are no longer registered as migrants or descendants of migrants in official statistics. This evaluation problem is aggravated by the fact that many statistics only record the variable 'nationality' but do not differentiate between non-German residents of the first, second or third generation.

If different statistics are included in the analysis, it is at least possible to assess the scope of different types of migration, which in turn makes it possible to draw indirect

[13] Since November 2002 the official name of the Federal Government´s Commissioner for Foreigners´ Issues is Federal Government Commissioner for Migration, Refugees and Integration.

conclusions about the composition of Germany's resident population. For example, one can use migration statistics for *Aussiedler*, who are registered as German nationals, in order to estimate that since 1990, respective inflows of Aussiedler and accompanying family members have amounted to more than 2.3 million persons. Whereas these entry statistics register *Aussiedler* per person, most other migration statistics do only register entries and departures. In other words, these statistics do not register the actual number of persons that have migrated to Germany, but migration flows across German national borders. Consequently, all persons that enter or leave Germany repeatedly during one year are registered several times by entry and departure statistics. An analysis of respective data does therefore have to take into consideration that the total of registered migration flows significantly exceeds the actual number of migrants. Furthermore, if statistics do only record changes in the place of residence, it is impossible to make any statements about the duration of migrants' residence in Germany. The quality of statistical data could therefore be improved by including the (intended) duration of a migrant's residence in the country.

6. Legislation against discrimination

6.1. DOCUMENTS RELATED TO ARTICLE 13

With the signing of the Amsterdam Treaty in October 1997 the foundation for practical policies of equal treatment in the European Union has been provided. For the implementation of the conditions in the individual member states detailed directives are necessary which again have to be translated in national law. Up to now **two directives** have been prepared, one being the Directive 2000/43 of the Council for Equal Treatment without Difference of Race and Ethnic Origin of June 29, 2000. In this directive the features **race**[14] **and ethnic origin** are taken up and a discrimination ban for all areas of life is established (**vertical approach**). The other directive was enacted on November 27, 2000; it is directive 2000/78 EG of the Council for the Determination of a General Frame for the Realisation of Equal Treatment in Employment and Occupation. In this regulation the discrimination features religion and belief[15], handicap, age and sexual orientation are also considered beside race and ethnic origin, though just for the areas **employment and occupation (horizontal approach)**. The unequal treatment on the basis of citizenship has explicitly been excluded from the regulation of the directive. However, the Federal Government has promised that while working on the antidiscrimination bill existing differing regulations for Germans and foreigners in individual laws and regulations will be reviewed and, if need be, abolished (see Deutscher Bundestag 1999; PUBDE0475).

6.1.1. Draft of an Act for the Prevention of Discrimination in Civil Law (Anti-discrimination Bill)

[14] Whereas the EU keeps on using the term race, it distances itself from the underlying theories in the preliminary comments to the directive: "The European Union rejects theories trying to prove the existence of various human races. The usage of the term "race" in this directive does not imply the acceptance of such theories." [own translation] (Richtlinie 2000/43 EG of the Council).

[15] "World view" has to be differentiated from "belief" as religious belief.

In February 2002 the Federal Ministry of Justice presented the **Draft of an Act for the Prevention of Discrimination in Civil Law (Civil Law Antidiscrimination Bill).** This slightly modified draft replaces the draft of a law presented in December 2001 which was supposed to be passed by the end of the last parliamentary term (until September 2002). Because of **heavy protests** of various interest groups and probably also because of the government's concerns that the anti-discrimination bill might have a negative impact on the election, as it was after all not a "winner-type sort of law" (see Kahlweit 2002; PUBDE0467), the passing of the law has been postponed to the next parliamentary term (see also chapter 6.1.2).

With the Act for the Prevention of Discrimination in Civil Law the two EU directives are to be translated in national law, at least partly. But in this law draft only the merely **contractual legal regulations** are established. Regulations concerning labour law and the question of access and participation in trade unions and employers' unions are to be implemented in a special labour law-oriented anti-discrimination act though. A draft for this law is not available yet. It is the objective of the law to considerably extend the general protection from discrimination in the German legal system by protecting persons in danger of discrimination more strongly. Up to now there is no explicit regulation in the German legal system imposing a ban on individuals regarding discrimination of others on the basis of "race" or ethnic origin.

CENTRAL ASPECTS OF THE NEW REGULATION:

By the civil law anti-discrimination bill particularly the Civil Code (***Bürgerlichen Gesetzbuch BGB***) as the central document of civil law will be modified. It is planned to introduce the following paragraphs under the subtitle "Prohibited discrimination":

- § 319a Prohibited discrimination
- § 319b Definition of terms
- § 319c Regulation of the burden of proof
- § 319d Accepted differentiation
- § 319e Legal Claim for failure, elimination of results and compensation.

According to **§319a** nobody must be directly or indirectly discriminated or pestered on the basis of "race", ethnic origin, sex, religion or belief, handicap, age or sexual identity regarding 1. the reasoning, termination and formulation of **contracts** which are publicly offered or which are concerned with **employment, medical care** or **education**, or regarding 2. access to or participation in organisations with members of a particular occupational group[16]. In this respect the draft goes beyond the discrimination features "race" and ethnic origin in the directive and includes other features as well.

In **§319b** the terms indirect and direct discrimination as well as pestering are defined more precisely. "A **direct** discrimination exists when a person is treated, has been treated or would be treated in a less favourable way than another person in a comparable situation on the basis of one feature listed in §319a section 1 BGB" [own translation] (§319b Abs.1 BGB). Direct discrimination is therefore a type of discrimination which

[16] Here neither trade unions nor employers' unions are meant, because those will be subject to separate regulations. This regulation aims at, for example, organisations consisting of self-employed members.

occurs due to differing treatment. This is different from indirect discrimination where discrimination usually occurs when 'unequals' are treated equally: "An **indirect discrimination** exists when seemingly neutral regulations, criteria or proceedings might discriminate persons in a special way on the basis of one or several features listed in §319a section 1 BGB, if the regulations, criteria or proceedings in question help a legitimate request and the means are appropriate and necessary to fulfil this request" [own translation].[17] All in all the wording of the paragraphs in the draft largely sticks to the formulations in the EU directives.

§319c BGB contains regulations to **simplify the provision of proof** as well as the shifting of the burden of proof in favour of victims of discrimination demanded in article 5 of the directive 2000/43/EG. If the victim can make facts credible which lead to the assumption that the discrimination ban has been violated by a certain person, the person reproached with this accusation has to proof that this is not a case of discrimination.

In **§319d BGB** exceptional matters are established which allow for differentiation. According to section 1 No. 1 a **permissible differentiation** exists for contractual relationships between employer and employee, for example, if the ethnic origin or another feature listed in §319a section 1 BGB constitutes an important occupational precondition and the existence or non-existence of this feature is appropriate and required for carrying out this occupation. According to §319d section 1 No.2 BGB a permissible differentiation for other contracts does only exist if it is justified by objective reasons. Race and ethnic origin are excluded from that which implies that no objective reasons exist for the differentiation on the basis of race and ethnic origin. Section 3 of this paragraph is also of significance: "A permissible differentiation does additionally exist in all cases of §319 section 1 BGB, if unequal treatment serves the interest of establishing full equality in the prevention or reduction of discrimination or pestering of a person or group of persons affected" [own translation]. By this, it is taken into account that there are certain groups in society that are discriminated and require special protection. Measures which, for example, aim at the vocational training of young migrants can therefore be continued without the concern that other groups might take legal action in order to obtain the right to participate, too, on the basis of the anti-discrimination bill.

§319e describes the **legal consequences** of the ban. These primarily consist of a legal claim for refraining from discrimination and on a treatment free of discrimination (**elimination of consequences**). If the discrimination cannot be eliminated, the person affected has the right to claim an amount of money as an appropriate compensation (**compensation for damage**). Whereas it was planned in the previous draft of the anti-discrimination bill to delete the claim for elimination of consequences, "if on the contents stipulated in the contract a contract with a third party has already been closed." [own translation] (Bundesministerium der Justiz 2001, S. 6; 4B0021), this half sentence has been deleted in the new draft.

By modifying **§2 of the Act on Applications for Restrictive Injunctions** (*Unterlassungsklagengesetz*) by adding section 3 not only the person affected has the right to claim the refraining from discrimination, but also organisations with legal capacities which have made it their task to defend the interests of disadvantaged groups

[17] The third half sentence of § 319b Section 2 BGB allows for a considerable scope which has to be more precisely defined by the courts in jurisdiction. It remains to be seen – if the law will be passed in the current version - to what extent this paragraph can indeed contribute to a reduction of discrimination.

of persons that might be affected by discriminations, by counselling and providing information (**Civil Law Petition of Associations**).

6.1.2. Response to the anti-discrimination bill

In the discussion on the draft of a law for the prevention of discrimination in civil law **two opposing opinions** can be noted. For organisations working in social work with migrants, anti-discrimination activities or similar areas the law draft was principally too restrictive. From the side of employers' associations or organisations of proprietors who rent out residential buildings as well as from the side of some political parties, the catholic and the protestant church the draft was strongly criticised.[18]

The main argument of the opponents[19] of the law draft was **the inclusion of the discrimination features** sex, religion or beliefs, handicap, age and sexual identity. Whereas these features were only considered for the labour market in the EU directives, discrimination will also be banned in the other areas (e.g. contracts of purchase, rent or insurance, medical care, education) on the basis of these features according to the German draft. Beside the accusation that this extension would violate EU law (see Deutscher Anwaltverein 2002; 4B0025)[20] or that this law principally mistrusts the citizens (see Geis 2001; 4B0017), mainly a massive **limitation of the freedom for contracts** of citizens as well as entrepreneurs has been criticised (see ibid. Deutscher Anwaltverein 2002; 4B0025, Haus & Grund Online; PUBDE0466). Also the two Christian churches expressed serious reservations (the Central Council of Jews, however, supported the idea of protection from religious discrimination), as the law would make it impossible for them to preferentially accept persons with a certain denomination, e.g. in kindergartens. In the statement by the German Lawyers' Association (2002) the question was raised to what extent such a limitation would be anti-constitutional. The claim for equal treatment is indeed embodied as a principle in the Basic Law, but also the freedom for contracts is guaranteed for every individual by the constitution. Freedom for contracts, however, means "the freedom of the individual to decide on the closure or non-closure freely in one's own estimation and that means that the decision might also be made on the basis of un-objective reasons or arguments that might be disapproved of." [own translation] (ibid.)

[18] It is not possible to discuss all the individual statements on the law draft in every detail here. An overview of various statements can be found on the website of the Anti-Racism Information Centre (ARIC; NFPDE0021) at http://www.aric-nrw.de/.

[19] In the discussion about the anti-discrimination law one cannot really talk about opponents and supporters as a ban of discrimination has in principle been considered positive and necessary by all sides. Nevertheless, we will refer to those groups demanding a limitation of the discrimination ban as opponents of the law draft. On the other hand, we will refer to those groups supporting an extension of the discrimination protections as supporters of the law, even if they criticise the current draft as being too restrictive.

[20] Beside the fundamental question whether the making of an anti-discrimination law is under the jurisdiction of the EU at all, especially the German interpretation of the EU directive has been criticised. It was argued that the EU intended to avoid an extension of the discrimination features, otherwise it would not have presented two different directives. As soon as the German draft exceeds the scope of the directives, it would no longer be legitimised by the EU directives and therefore would have to legitimise itself. This would not be possible without a constitutionally required consideration whether the personal freedom would be violated by the legislator (e.g. freedom of contracts). Especially because it is not clearly determined in the second directive that measures by the individual state have to be take into consideration which "are necessary for the protection of the health and for the protection of rights and freedom" [own translation] (Richtlinie 2000/78/EG of the Council).

In the wake of this fundamental ban of discrimination the opponents of the law draft were concerned about a **flood of court trials** which might be pouring on the responsible courts. For example, atheists were mentioned who might take legal action in order to obtain access into medical care centres run by the church, it might also become impossible to deny extreme organisations the possibility to rent meeting rooms or it might happen that young people take legal action to obtain privileges that are now reserved for senior citizens. The concern of a large number of court trials is even deepened by the shifting of the burden of proof contained in the law.

Above all, the opponents of the anti-discrimination bill criticised that apart from the features race and ethnic origin the discrimination features sex, religion or beliefs, handicap, age and sexual identity, too, were included in the draft. Religion and beliefs as well as age were considered especially problematic.

Exactly this extension of the discrimination features is one of the aspects that was welcomed by the supporters of the law draft. Additionally, however, the draft was criticised as being not resolute enough – if not even totally insufficient. The organisations demanding a **tightening of the discrimination ban** were mainly non-governmental organisations working with migrants.[21] Most organisations considered it very problematic that **the term race is used** in the German draft. Whereas race is used as a political category in the international or particularly English-speaking discourse and refers to those persons who are a target group of racism, the term ”race” in German-speaking countries is exclusively used as a biological concept (see Leskien cited in Forum gegen Rassismus, 2001; PUBDE0108). It was therefore demanded to replace the term race by other terms, such as skin colour, language or the usage of ”racist discrimination” instead of ”discrimination on the basis of race”. At least, however, the law should distance itself from theories that give biological reasons for the existence of various human races.

Another criticised aspect was that some points fixed in the directives by the EU have not at all **or only insufficiently** been **considered** in the German law draft. Concrete details on the implementation of norm adjustment proceedings or on the establishment of bureaus for equal treatment are missing, for example. Regulations on how a victimisation of prosecuting parties or witnesses can be avoided are also not contained in the current draft. In addition, an extension of the regulations to areas under public law as well as to the labour market are demanded[22]. An immediate inclusion of the labour market would have made it possible to develop a uniform bill on anti-discrimination which would have lead, beside a **more extensive symbolic significance**, to a much **easier handling** for the persons affected.

[21] Examples for organisations that have provided a statement on the draft by the Federal Ministry of Justice are the Intercultural Council in Germany e.V. (Interkultureller Rat in Deutschland e. V.; 4B0018), the Office against Age Discrimination (Büro gegen Altersdiskriminierung e. V.; 4B0023), the Arbeiterwohlfahrt (AWO; 4B0024), Pro Asyl (4B0019), various anti-discrimination initiatives in NRW (4B0020), the German Association of Trade Unions (Deutscher Gewerkschaftsbund DGB; 4B0022) or the German Association of Female Lawyers (Deutscher Juristinnenbund; 4B0021). The statements are of differing emphasis and intensity, so that in this report only the central aspects can be presented which have been addressed by several supporting groups.

[22] It is criticised by opponents as well as by groups that support the law in principle that the areas of the labour market that come under the scope of the law are not clearly defined. Whereas in § 319a section 1 No.1b employment is included in the first place, it is excluded again in § 319a section 2. Here, the interest groups call for an unambiguous regulation.

Whereas the opponents of the anti-discrimination bill predict a considerable flood of court trials on the basis of the shifting of the burden of proof, the supporters of the law reject this assertion. On the one hand, experiences with the relief of the burden of proof (such as in giving equal rights to males and females) show that this does not necessarily result in a sharp increase in court trials. In addition, it would cause disproportionately more difficulties, for example in laws of landlord and tenants, to supply credible facts that discrimination has occurred than, for example, in labour law. Whereas it is possible via trade unions and work committees to obtain information on discrimination in a company, this is very difficult to achieve in other areas of life. For that reason a **genuine shift of the burden of proof** is demanded (see e.g. Deutscher Juristinnenbund; 4B0021; Deutscher Gewerkschaftsbund 2002b; 4B0022) and on the other hand, the possibility of joint petitions has been welcomed and the **extension** of the possibility of petitions of associations to other groups, e.g. anti-discrimination bureaus and to a larger number of cases, e.g. against private persons, has been recommended (see e.g. AWO; 4B0024). From the side of the opponents of the anti-discrimination bill in its current version the possibility of a petition of associations is seen very critically. Too many associations would have the possibility to take legal action and, in addition, it would have to be put in more concrete and detailed terms when exactly a petition of an association is possible, e.g. only in cases of the danger of repetition (see Deutscher Anwaltsverein; 4B0025).

The **possible sanctions** that are suggested in the draft by the federal Ministry for Justice are discussed controversially, too. Whereas the opponents of the draft consider the sanctions too excessive (see ibid.) and criticise, above all, the possibilities of claims for compensation of damage (see e.g. Geis 2001; 4B0017, Haus & Grund Online; PUBDE0466), the supporters of the law think that the sanctions do not go far enough. Apart from the limited possibility for compensation of damage they demand an extensive right of **compensation for caused pained and suffering** as well as further sanctions, such as the **withdrawal of licences** for restaurants (see e.g. Interkultureller Rat in Deutschland e.V. 2002; 4B0018; Antidiskriminierungsinitiativen aus NRW; 4B0020). In addition, it is demanded in several initiatives to include discrimination crimes as factual criminal offences in the penal code, not least as a political signal against discrimination. (see e.g. Büro gegen Altersdiskriminierung e.V.; 4B0023; Antidiskriminierungsinitiativen aus NRW; 4B0024). All in all, the majority of organisations working in anti-discrimination activities consider the draft a **small step** in ”the direction of a protection from discrimination for private persons based on individual rights” which, however, ”only keeps on legitimising existing structural discrimination.” [own translations] (Antidiskriminierungsinitiativen aus NRW; 4B0024).

To what extent the law can have any concrete impact depends on the **jurisdiction** though, as several areas – at least in the current law draft – leave large scope for interpretation, such as the question of what might be counted as religion and belief or the question what sort of objective reason justifies unequal treatment.

Whereas the parliamentary debate on a civil-law anti-discrimination bill has at least been initiated, the legislative has not made any suggestions yet for **a labour law-related anti-discrimination act**. There are, however, anti-discrimination programmes in some larger companies (e.g. at BASF). In addition, agreements against discrimination and racism have been closed between the management and the work committee in numerous

companies since the mid-nineties (e.g. at Ford, Opel, VW, Fraport, Thyssen, Jenoptik)[23]. Legal action can be taken at a labour court for the observance of these agreements. With regard to the EU directive which has to be translated into national law by the German legislative body by the end of 2003 the German Trade Union Confederation (Deutscher Gewerkschaftsbund; DGB) has developed a **Model Works Agreement** which has been enclosed in the annex of this report (see chapter 12.4).

6.1.3. Recent Developments

At present, it is impossible to make any predictions about when and in which form the EU anti-discrimination directives will be transferred into national law, even though the original plan was to **implement the first EU directive by mid-2003**. On the contrary, it can be assumed with sufficient certainty that the original bill presented by the federal government at the beginning of the year 2002 will never be passed. The new federal justice minister, has expressed her support for restricting the original government proposals and excluding the discrimination grounds **religion, belief and age** from the government bill. Up to now, the government has failed to present fresh legislative proposals. Current debate focuses not only on restricting discrimination grounds to those cited by the EU directive, i.e. "race" and ethnic origin, but also on weakening possible sanctions for discrimination cases. One proposal is that a person convicted of discrimination should not be forced to sign an agreement with the victim of discrimination. Another subtlety that is currently being discussed focuses on formulations and refers to the legal differences between granting "access without discrimination to publicly offered goods, services and real estate" and "access without discrimination to goods, services and real estate that are available to the public". The latter formulation aims at differentiating between standard contracts and contracts involving personal trust and closeness, e.g. rental agreements for "granny flats" or terraced houses.

Whereas these considerations still assume that the original government proposals for a civil-law discrimination act can be amended, there have also been increasing calls for abandoning the entire project and pooling various existing directives instead (Directive 2000/43, Directive 2000/78 and the Directive for Preventing Sex Discrimination). Merging these directives would also have the benefit of providing some respite. On the whole, it would be quite unrealistic to expect that an anti-discrimination bill will be passed in 2003.

6.2. LEGISLATION FOR SPECIAL AREAS

As seen in Chapter 6.1 the prevention of discrimination has not yet been legally regulated in a comprehensive anti-discrimination bill. There are, however, **discrimination bans** in a number of specific laws. With regard to these regulations one has to differentiate the public and the private sector.

6.2.1. Public sector

[23]These agreements care accessible via the website of the IG Metall (www.igmetall.de).

Of special importance for the **public sector** is the **Basic Law** which determines in article 3 section 3 that nobody shall be discriminated or favoured because of sex, origin, race, language, country of origin and ethnicity, denomination, religious and political views. In addition, nobody must be discriminated because of handicaps. This article therefore decrees a discrimination ban in the relationship of state and citizen. This means that the Basic Law shall be directly applied to all administrative bodies (e.g. in the areas schooling, distribution of housing etc.) and the right to equal treatment can be individually obtained through legal action (judgements of courts in this context regarding discrimination based on, e.g. origin, however, do not exist yet.) A civil servant who violates these rights guaranteed by the constitution consequently also violates his duties according to his contract of employment and has to expect sanctions or, in serious cases, dismissal.

For employment in public service, too, explicit regulations with regard to discrimination exist. Unequal treatment on the basis of sex, descent, denomination, religious and political views, ethnic origin or forms of relationships are prohibited according to § 8 paragraph 1 of the Federal Civil Service Law (***Bundesbeamtengesetz***)[24]. Similar regulations can be found at §7 Civil Service Outline Legislation (***Beamtenrechtsrahmengesetz***) as well as in §67 Federal Staff Council Law (***Bundespersonalvertretungsgesetz***).[25]

6.2.2. Private sector

In the **private sector**, on the other hand, no extensive protection from discrimination exists. Gender-based discrimination by employers is indeed prohibited according to §611a Civil Code (***Bürgerlichen Gesetzbuch BGB***), discrimination on the basis of ethnic origin, however, has not been considered in this law yet. Explicit regulations with regard to discrimination only exist in some individual laws, for example in the Act on the Supervision of Insurance Matters (*Versicherungsaufsichtsgesetz*), the Act on the Transportation of Persons (*Personenbeförderungsgesetz*) or the Telecommunication Act for the Client Protection in Telecommunication (for further details see European Monitoring Centre on Racism and Xenophobia 2002, S. 21f.; PUBDE0095). There is one bill that has included an extensive discrimination ban during the reporting period of RAXEN3, and this is the Industrial Relations Act (*Betriebsverfassungsgesetz*). For that reason we will present the Industrial Relations Act as well as various Industrial Relations Agreements in the following.

Industrial Relations Act *(Betriebsverfassungsgesetz BetrVG)*

[24] However, according to § 7 Section 1 No. 1 Federal Act for Civil Servants only those persons can be employed as civil servants who have the citizenship of Germany according to article 116 Basic Law or of another member state of the European Union. Persons form EU member states are also excluded though, "if the tasks require it" [own translation] (§ 7 Section 2 Federal Act for Civil Servants). However, the Federal Interior Minister can, according to §7 section 3 Federal Act for Civil Servants, make exceptions of section 1 No. 1, if there is an urgent need for the employment of a civil servant, as it was the case for police officers. The state of Berlin, for example, has amended its Teacher Training Act to introduce a quota for teacher trainees from non-EU countries. Starting in the school term 2003/2004, 3% of all teacher training places are to be reserved for applicants from non-EU countries (cf. Frankfurter Rundschau 2003).

[25] For further details see European Monitoring Centre on Racism and Xenophobia 2002 (PUBDE0095)

Whereas the changed laws in the area integration have a rather indirect impact on anti-discrimination by improving the conditions for foreign citizens living in Germany, the Act on the Reform of the Industrial Relations Act (in force since 28/07/2001) contains paragraphs which **actively oppose discrimination**. According to §75 BetrVG Section 1 employers and works committee have to take care of the fact that all persons working in a company are treated according to the principles of right and equitableness, particularly **preventing unequal treatment** of persons on the basis of their descent, religion, nationality, ethnic origin, activities in trade unions or political parties, their views or their sex or sexual identity. They have to make sure that employers are not discriminated on the basis of age. In addition, every employer has to report at least once a year on the **situation of the integration** of foreign employees working in the company in a meeting of the workforce, therefore has to account for their successful integration efforts (§43 Section 2 Industrial Relations Act – BetrVG). The employee has the right to make a complaint to the company department in question, if he feels discriminated (§84 Section 1 BetrVG). If the employer considers the complaint to be well-founded, he is obliged to act immediately to improve matters (§84 Section 2 BetrVG). It is not stated in the Industrial relations Act, however, which sanctions might be imposed against the employer in cases he does not fulfil this duty. In addition, the members of the works committee will also be held responsible. Among others, they are responsible for the application of necessary measures for the fight of racism and xenophobia in the company (§80 Abs.1 Nr.7 BetrVG). On the other hand, the works committee has an important **monitoring function**. It can refuse the approval of the employment of an applicant, if it is concerned that the applicant might interfere with the company's working atmosphere by acting in a racist or xenophobic way (§99 Section 2 BetrVG).

6.2.3. Articles of Penal Code on racial violence

German criminal law includes regulations which allow the prosecution not only of offences and crimes such as intimidation, grievous bodily harm, arson and murder, which are not necessarily related to the culprit's political motivation, but also of so-called "communication or propaganda" offences.

In the judicial statistics, as in the Criminal Investigation Registration Service (KPMD), the propaganda crimes and incitement of the people clearly outweigh the other crimes with extreme right-wing background (cf. table 10). Among these crimes are:

- **§ 86 Penal Code („Distribution of propaganda material of anticonstitutional organisations")** makes the distribution of Nazi slogans and flyers an offence. It is therefore prohibited to distribute "propaganda material" of an anti-constitutional party/organisation or of a former National Socialist party or to make preparations for such a distribution. This material must neither be produced nor kept in stock or be imported or exported or kept in data files (keyword: internet) and must not be made available to other people. The mere possession and the production of such material without the intention to distribute it, however, does not constitute an offence. "Propaganda materials" are all texts which contain statements directed against democracy and the understanding between nations. Anyone who commits one of these offences could be sentenced to up to three years in prison. For example, not only the author of flyers, but also the printer and distributor or

somebody who stores the material in his apartment in order to distribute it later will be subject to prosecution.

- **§ 86a Penal Code ("Using symbols of anti-constitutional organisations")** makes using the swastika or other Nazi symbols an offence. Anybody who uses the symbols - particularly flags, military insignia, parts of uniforms, slogans and salutations - of a former National Socialist organisation in public, in a meeting or in publications, commits an offence (e.g. displaying the swastika in its various forms, the Horst-Wessel song, the Hitler salutation, portraits of the "Führer", SS runes as well as the concluding remark "*Mit deutschem Gruß*" at the end of al letter if the rest of the letter shows an extremist tendency, could be sentenced with prison up to three years). In recent years it has also become an offence to use symbols that are extremely similar to symbols of anti-constitutional organisations.
- According to **§ 130 Penal Code ("incitement of the people")** anyone who incites hate or violence against parts of the population (for example non-German or Jewish residents) or "against a national, racial, religious group or a group defined by national customs and traditions" (own translation) or who abuses, disparages or slanders these groups and thereby attacks human dignity can be sentenced to prison between three months and five years.
- According to **§ 131 Penal Code ("glorification of violence")** the production and distribution of texts which illustrate cruel or otherwise inhuman violence against people in a glorifying or trivialising manner is prohibited.[26]

In addition to national legislative projects, Germany has also signed respective **international agreements** (for more detail see Addy 2003; PUBDE0500) and founded an **Institute for Human Rights**, thus underlining its determination to fight racism, xenophobia and discrimination.

6.3. RELATED RESEARCH

Up to now, only few studies have focused on anti-discrimination legislation. Among these there are studies that evaluate if migration and integration laws contain an indirect protection against discrimination (cf. e.g. Opolony 2001; PUBDE0094, Angenendt 2002; PUBDE0064, EUMC 2002; PUBDE0095). Other publications provide assessments of the impact of legal amendments on discrimination (cf. e.g. Dornis 2002; PUBDE0064).

Furthermore, non-governmental organisations, special interest groups and political parties have published a large number of statements, e.g. on the government anti-discrimination bill (cf. Chapter 6.1.2) or on the new migration law (cf. Chapter 12.3.2 in the Appendix). These publications evaluate possible consequences of legislative proposals for different groups of migrants or migrant projects. In addition, they discuss legal matters (such as the question whether anti-discrimination regulations are in accordance with the legal principle of contractual freedom).

6.4. GAP ANALYSIS

[26] Cf. for more detail on individual paragraphs: Hessische Landeszentrale für politische Bildung 2000

As already outlined in Chapter 6.1, Germany has until now failed to transfer EU anti-discrimination directives into national law. Even though there are several specific legal regulations banning discrimination in certain areas, above all in the public sector, Germany has no comprehensive anti-discrimination act. Such a comprehensive anti-discrimination act could not only close gaps in the protection of residents (e.g. in civil law), but also have a positive effect on public awareness.

7. Impact of anti-discrimination legislation

7.1. INSTALMENT OF INSTITUTIONS AND DESCRIPTIVE DATA ON RECORDED COMPLAINTS

According to Article 13 of the EU anti-discrimination directive, which aims at guaranteeing the equal treatment of all EU residents irrespective of their race or ethnic origin, EU member states are called upon to set up administrative bodies for promoting the equal treatment of all residents without discrimination because of their racial or ethnic origin. Member states are to ensure that these administrative bodies have the following competences:

- providing independent assistance to victims of discrimination in pursuing their complaints against discrimination, as well as assistance to associations, organisations or other legal entities referred to in Article 7 (2),
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on all discrimination-related issues.

Both the first anti-discrimination bill, which has meanwhile been revoked by the German government, and the proposals currently discussed in Germany do not provide for setting up such an administrative body.

At the federal level, the Federal Government Commissioner for Migration, Refugees and Integration is the administrative body whose responsibilities are closest to those envisioned by EU directives. The government commissioner has the following main responsibilities:

- working towards a peaceful and harmonious living together of German and non-German residents, fostering mutual understanding and opposing xenophobia;
- opposing unfair treatment of non-German residents.[27]

However, one has to bear in mind that anti-discrimination work only constitutes a small part of the responsibilities of the Federal Government Commissioner for Migration, Refugees and Integration. Consequently, this authority cannot focus on anti-discrimination work in the same way a separate administrative body could. For example, the federal government commissioner does not publish a regular discrimination report.

[27] cf. http://www.integrationsbeauftragte.de/amt/gesetz.stm

Some German states, in particular North-Rhine Westphalia, as well as several cities, e.g. Frankfurt/Main, have set up anti-discrimination offices which, among other things, register cases of discrimination and publish discrimination reports. However, these agencies only operate locally, and there is no national anti-discrimination network or federal agency which publishes reports on discrimination for the whole of Germany.

7.2. DATA ON COURT CASES

As EU directives have not yet been implemented in Germany and bans on discrimination are only beginning to become part of other laws, it is not surprising that there are only **a few legal judgements** which explicitly relate to discrimination (cf. here also the European Monitoring Centre on Racism and Xenophobia 2002, p. 9; PUBDE0095). This topic is most frequently made a subject of discussion with regard to the labour market, not least because on the basis of works agreements on the combating and removal of discrimination against foreign workers and on the promotion of equality in the workplace, greater protection against discrimination exists than in other fields.

Although numerous cases of discrimination in the workplace are not made public as those affected often remain silent for **fear of the consequences**, some cases of discrimination do reach the courts. Some of this limited number of cases are mentioned in the following:

> Frankfurt Regional Court (*Landgericht*) ruled in March, 2001 that the termination of employment of the manager of a limited liability company solely on the basis of his ethnic origin was **contrary to public policy** and hence invalid. This lawsuit, filed by a British citizen of Indian origin against the German subsidiary of a Turkish bank, was thus successful (File number 3-13 O 78/00).

In some cases coming before a court, the question is raised whether an employer has to allow a Muslim woman to wear a headscarf whilst working.[28]

The Federal Labour Court (BAG) (*Bundesarbeitsgericht*) decided on 10 October, 2002 in a verdict that wearing a headscarf for religious reasons was not grounds for dismissal (BAG 2 AZR 472/01). Thus the court found in favour of a Muslim woman who was dismissed by her employer, a department store, after she had announced that she would in future also be wearing a headscarf at work due to her Islamic faith. The plaintiff had subsequently lodged an appeal against unfair dismissal. She considered the dismissal to be inadmissible as it was a disproportionate encroachment upon her freedom of faith. The defendant maintained the view that the plaintiff's working with an 'Islamic headscarf' could not be justified because of the calibre of the department store. After the lower instance had agreed with the employer, the plaintiff's appeal at the Federal Labour Court was successful.

Against this decision by the Federal Labour Court the management of the department store has lodged a constitutional appeal, claiming that the ruling constitutes a violation of

[28] Whilst some people and organisations term the banning of wearing headscarves while teaching a form of discrimination, there are others who merely see it as an attempt to exclude political and religious controversies from the classroom. These two positions are reflected in the legislation on this matter.

constitutional rights. However, in July 2003 the Federal Constitutional Court has refused to hear the appeal, stating that the Federal Labour Court has acted appropriately and taken the basic rights of both parties into consideration in its ruling (File number: 1 BvR 792/03).

Whereas this decision has largely resolved the issue of whether private-sector employees are entitled to wear headscarves during work in favour of women wearing headscarves (exceptions might be when work safety or hygiene do not permit the wearing of headscarves), the same question is still unresolved concerning public-sector teachers and nursery-school teachers.

In a case in October 2000 in the Administrative Court (*Verwaltungsgericht*) in Lüneburg, the court decided in favour of the plaintiff. The 42-year-old German, who had converted to Islam, won the case and had to be taken on as a teacher despite wearing a headscarf (File number: 1A 98/00). The court decided that wearing a headscarf as an expression of religious conviction was **not in conflict** with her suitability and aptitude as a teacher.

A similar case has been decided by the Dortmund labour court: A Muslim nursery-school teacher had been dismissed after she had insisted on wearing a headscarf while working at a municipal nursery school. The court has ruled that the employer is not entitled to make the employee redundant, stating that nursery-school teachers are not necessarily regarded by the public as representatives of the municipality, and that the city of Dortmund could still observe the principle of neutrality if a Muslim employee of the city insists on wearing a headscarf at work for religious reasons. However, the court also stated that the employer would be entitled to act if the nursery-school teacher tried to proselytise children that have been put in her care (cf. Ref. 6 Ca 5736/02).

The judgement of a case before the High Administrative Court (VGH) (Verwaltungsgerichtshof) Baden-Württemberg in June 2001 was a different one, however (File number: 4S 1439/00). The VGH decided that wearing a 'Islamic headscarf' was not a question of clothing, but of a **religious symbol** and consequently banned the teacher from wearing the headscarf in class. The teacher, a Muslim who originally came from Afghanistan, appealed against this verdict, but the Federal Administrative Court (*Bundesverwaltungsgericht*) confirmed this judgement of the lower court. The court decided on 4 July, 2002 that the employment as a teacher for primary and secondary modern schools (Hauptschule) as a civil servant for a probationary period may be rejected if the applicant is not willing to refrain from wearing an 'Islamic headscarf' while teaching (reference: BverwG 2 C 21.01). The court justified its verdict by saying that civil servants are obliged to be **neutral** in questions of faith and, in addition, pupils had the right 'not to be exposed by the state to the influence of a foreign religion, not even in the form of a symbol without having the chance to avoid it' [own translation]. This fundamental freedom was deemed by the judges to be of a higher value than the right to freely practice one's religion. The judgement by the Federal Administrative Court is not without its critics, though (cf., for example, Rux 2002; PUBDE0470). The plaintiff has lodged a constitutional complaint. On 24 September, 2003, the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that there was no sufficiently definite legal basis in the present laws that supported the banning of teaching staff wearing headscarves in school and during their lessons. In so doing, they supported the plaintiff and overturned the decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 4 July, 2002. Nonetheless, it remains open to the individual federal states to establish a legal provision

which forbids the wearing of headscarves in the classroom (case number: BvR 1436/02). Whilst still considering the different basic rights (that of religious freedom on the one hand and that of the duty of neutrality by the state on the other), a limitation on the right to religious freedom can thus be legally determined for the field of education. Following the judgement passed by the Federal Constitutional Court, the federal states of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Hesse, Lower Saxony and Saarland announced that they would legally impose a ban on headscarves for teaching staff during their lessons (see the press release of the Conference of the Ministers of Education and Cultural Affairs of the Länder (*Kultusministerkonferenz*) of 10 October 2003, which can be accessed at
www.kmk.org/aktuell/home1.htm).

Whilst more subtle forms of discrimination are less frequently dealt with by the courts, instances of xenophobic or **racist attacks in the workplace** or in factories against employees of non-German origin appear more frequently in the courts. Employment law expressly provides the chance to dismiss employees who are seen to make (xenophobic or racist) attacks (verbal or physical) on migrant fellow-employees. "This includes both individual legal regulations, such as warnings and dismissal, as well as collective legal provisions, especially the new norms of the Works Council Constitution Law (BetrVG) (*Betriebsverfassungsgesetz*)" [own translation] (Opolony 2001, 456; PUBDE0094). However, those affected frequently do not take action against such actions themselves for fear of the consequences, but the employers issue notices of dismissal against the 'perpetrators'. Thus, an employer can dismiss an employee if the latter creates a xenophobic or anti-Semitic atmosphere by means of xenophobic or extreme right-wing utterances or acts and consequently disturbs the peace in the workplace.

In recent years, judgements relating to employment law have increasingly dealt with cases involving racist occurrences, especially cases of **insults** or racist utterances towards migrant workmates. Correspondingly, appeals are increasingly filed against dismissals because of xenophobic behaviour. Here, too, there have been differing rulings according to the individual case.

The following should serve as an example of a judgement passed at the highest level of the court system: the Federal Industrial Court (BAG) (*Bundesarbeitsgericht*) (judgement of 1.7.1999 - 2 File number: 676/98) ruled **in favour** [29]of the **dismissal** without prior warning of a trainee who, during his working hours, had made a metal sign with the words "Work makes one free - Turkey beautiful country" and affixed it to the workbench of a Turkish workmate. He had also sung songs with an anti-Semitic and Nazi content whilst still in the workplace.

Two years previously, the State Industrial Court (*Landesarbeitsgericht*) of Rhineland-Palatinate had ruled that xenophobic behaviour at work is a cause for dismissal (File number: 6 Sa 309/97). The court rejected the appeal of a machine operator against his dismissal for confronting a Turkish fellow-employee with xenophobic utterances and drawings. For example, he had threatened his Turkish workmate that he would be "strung up as soon as the order came from above".

[29] However, the BAG did point out in its decision that 'there is no such reason for dismissal as 'xenophobia' as such. In the individual case, the decision had to be taken whether the behaviour of an employee detracted from the solidarity within the company in an unjustified manner' [own translation] (Opolony 2001, 457; PUBDE0094).

Schools are also entitled to sanction xenophobic and anti-Semitic behaviour of pupils. In one incident, for example, a 14-year old pupil had on a class trip to the Czech Republic abused the guest-book of the museum at the former concentration camp in Theresienstadt by writing down a comment that read: "Heil Hitler, beat the Jews to death". The school then excluded the pupil from the class trip, a decision that was upheld by the administrative court in Göttingen when the pupil's parents appealed against the decision. In its ruling, the court called the behaviour of the pupil a "severe breach of duty" which justified his exclusion for educational reasons (Ref.: 4 A 4139/01; PUBDE0506).

7.3. REPORTS ON RACISM AND DISCRIMINATION

Cases of racist violence and related offences with a right-wing extremist background are regularly reported on in Germany. Information on these offences is published at the federal level (cf. Bundesamt für Verfassungsschutz - Federal Agency for the Protection of the Constitution 2003; PUBDE0166) as well as at the state level (e.g. Landesamt für Verfassungsschutz - State Agency for the Protection of the Constitution Baden-Württemberg 2001; 2B0021; State Agency for the Protection of the Constitution Bavaria 2001; 2B0021). However, these reports only comprise information on those cases of discrimination that are legally classified as offences according to the Criminal Code. Other cases of discrimination, e.g. discrimination against persons who apply for jobs or wish to rent a flat, are not included. Mainly because there is no comprehensive anti-discrimination act, Germany has so far not set up a national reporting system for cases of discrimination. Even though the report by the Federal Government´s Commissioner for Foreigners´ Issues (Beauftragte der Bundsregierung für Ausländerfragen, 2002) reports on the situation of non-German residents and comprises one chapter on discrimination against non-Germans, this chapter focuses on definition and statistics problems and countermeasures against discrimination rather than reporting on the extent of discrimination and citing individual cases. Up to now, quantitative registrations are only carried out by local anti-discrimination offices. The discrimination cases are registered according to various criteria, for example according to nationality, origin and sex of the affected person, but also according to the area in which the victim has been confronted with discrimination (e.g. authorities, the police, education institutions, searching for an apartment) (see for example Antidiskriminierungsbüro Siegen 2000a; PUBDE0507). By way of limitation, it should be said that these cases are based on individual experiences by people with a migrant background. In addition, the registered number of cases is much too small to allow a statement on the general situation concerning discrimination in Germany or in special areas like the education system.

As it is extremely difficult from the methodological point of view to assess the extent to which differences between Germans and non-Germans can be traced back to forms of discrimination or whether they are caused by other factors, such as different social backgrounds, *"perceived discrimination"* is frequently used as a category in research of discrimination which can be easily measured in interviews (vgl. z.B. Worbs, 2001; 3B0033; Straßburger 2001; 3B0010; Bundesministerium für Arbeit und Sozialordnung 2002; 1B0030). In case of perceived discrimination an individual experience of discrimination is researched, independent of the fact whether it has actually occurred or not. Perceived discrimination, even if actual discrimination has not occurred, plays a major role for the feelings and behaviour of migrants: "If the host society is perceived as

'closed' and prejudiced, this may lead to a reinforcement of ethnic ties with negative consequences for the cultural, social and identificational processes" (Heckmann/Lederer/Worbs 2001, p. 63; 3B0033). Thus, the individual perception of discrimination is also of importance, irrespective of the extent to which this subjective perception corresponds to the actual discrimination.

In addition, several social-science research projects have attempted to measure discrimination objectively. Since discrimination can usually not be measured directly, the researcher attempted to deduce its appearance indirectly from still existent ethnic differences, so to speak, as a remaining "residual category" after all the important explanatory factors/variables had been checked. Such studies exist in the fields of education (Alba/Handl/Müller 1994; PUBDE0063) and employment (Granato/Kalter 2001; 1B0001), but the studies can only show that in these areas discrimination occur. They can give no information on extent and development of discrimination.

7.4. DATA ON DEVELOPMENTS AND TRENDS

Due to the lack of a national registration system for cases of discrimination it is impossible to make reliable statements about developments in discrimination. Trends can only by surveyed for criminal offences with a right-wing extremist background (cf. Study on racist violence 2002 and Chapter 12.5 in the Appendix).

8. Strategies, initiatives and good practices

Fundamental work, in the sense of 'good practice' projects, does not play such a great role in the field of legislation as it does, for example, in fields of education or the labour market, for the pure and simple reason that those addressed by the respective law are **obliged** to apply the new regulations. Thus, the law or decree itself can already be termed 'good practice' in cases where it has an anti-discriminatory effect. Nevertheless, there naturally still remain initiatives and measures within the field of legislation which can clearly be described as **'good practice'**. On the one hand, these include organisations which publicly support the rights of migrants and minorities. On the other hand, particular institutions may be named that advise victims of right-wing violence and discrimination and who accompany them in demanding their rights.[30] This is particularly significant as it is not only important that laws on anti-discrimination, for example, exist, but that these laws are applied consistently and the rights are claimed by those affected.

[30] In addition to these organisations which expressly act against racism and discrimination and who advise migrants with regard to these aspects, the many organisations which have been active for decades in offering social advice for migrants should, of course, not go unmentioned. Here reference is particularly made to the work of the charities (especially the *Arbeiterwohlfahrt, Caritas, Diakonie*) which shortly after the arrival of the first migrants who came to Germany to work started to look after them and since then have been involved in integration and anti-discrimination work. The many-sided support for migrants has included legal advice, for example, in questions relating to the laws on residence, even if this advice on legal matters was not their only task (for more precise information on the work of the charities, cf. Bosswick/Bronnenmeyer 2001; PUBDE0472).

NGOs which act on a world-wide scale, such as Amnesty International, but also a plethora of national organisations (such as the Internationaler Bund, Diakonie) or citizens' action groups discuss and investigate the **discriminatory and anti-discriminatory effects** in German laws, decrees and bills. In addition to their practical work with migrants, numerous bodies have also taken on the task of observing developments in German legislation with regard to integration and anti-discrimination. In this context, **informational meetings** are offered for migrants in which help is offered on legal matters. Moreover, many of these bodies comment publicly on this matter and make clear **political demands**, such as more lenient conditions for entry into Germany or for naturalisation.

VICTIM SUPPORT CENTRES AND ANTI-DISCRIMINATION OFFICES

Of particular importance, however, is another main task of these institutions, namely offering **legal advice** for migrants. On the one hand, mention may be made of advice in cases of conflicts with the German immigration and asylum legislation; on the other hand, there is the advice given to victims of right-wing violence and discrimination. Particularly these **victim support centres** have grown in number in recent years, not least to meet demands made by the federal government. Within the framework of the CIVITAS programme (ACTDE0100), for example, up to November 2001, six mobile advisory teams and eight victim support centres had been established in the new federal states.[31] The aim of the victim support centres is, on the one hand, to advise and assist victims of racist and extreme right-wing attacks and, on the other hand, to inform the general public from the perspective and in the interests of those affected (cf. http://www.abad-th.de/index.html). More concretely, the victim support centres offer their clients legal advice, support in finding witnesses, assistance and documentation whilst going to the authorities and to legal proceedings and establishing contacts with medical and psychological help. The victims are assisted in applying for compensation and, if need be, in obtaining legal aid to meet court costs. If possible, contact is made with local action groups offering support for victims. At the same time, known local cases of extreme right-wing violence are documented in chronologies.

In spring 2002, the majority of these support centres joined together into the 'Working Group of Advisory Projects for Victims of Racist, Extreme Right-wing and Anti-Semitic Violence' (**agora;** NFPDE0116) [own translation] (Arbeitsgemeinschaft der Beratungsprojekte für Opfer rassistischer, rechtsextremistischer und antisemitischer Gewalt). The aim of this working group is to provide quick and focused help for victims as well as to present the perspectives of the victim to others by means of lobbying and public relations work. In addition, the exchange of expert knowledge is to be promoted between the members (cf. http://www.agora-info.de).

DEVELOPING A GENERAL CONCEPT FOR ANTI-DISCRIMINATION MEASURES AT THE STATE LEVEL

Thanks to federal government funding especially for the Eastern German states, a large number of anti-discrimination initiatives has been set up there in recent years. North Rhine-Westphalia, on the other hand, was one of the first federal states to establish its own network of institutions working towards equal legal, political and social treatment of

[31] This put into action a cross-party request of March 2001 to the federal government to establish support centres for victims of extreme right-wing violence.

all residents and against discrimination against ethnic and national minorities. Johannes Rau, the former state governor of North-Rhine Westphalia, was among the main supporters of this programme. The state government of North Rhine-Westphalia funded a programme entitled "Measures against Discrimination – Fighting against Xenophobia and Racism", which supported nine local anti-discrimination projects (with a subsidy of DM 700,000 per year between 1997 and 1999)[32]. On the one hand, these anti-discrimination projects aimed at analysing the various manifestations and the underlying causes of racism. On the other hand, they developed countermeasures to prevent and oppose discrimination against non-German residents and ethnic minorities, as well as provide advice and counselling for victims of discrimination. North Rhine-Westphalia was thus the first of the federal states to establish a network of anti-discrimination projects (cf. Clayton/Wehrhöfer 2001; PUBDE0142).[33]

North Rhine-Westphalia's model project aimed at collecting data on the extent of discrimination, its manifestations and possible countermeasures. It developed and tested a wide range of countermeasures, e.g. advice centres, lobbying groups, mediation, further training for public sector workers (anti-discrimination training), thematic public-relations work, networking anti-discrimination initiatives etc. (cf. Antidiskriminierungsbüro Siegen 2000b; PUBDE0040).

Local anti-discrimination work over the last years has laid the foundation for developing a general concept for anti-discrimination measures at the state level, which in turn could be used as a blueprint for other federal states. For example, one concept for a state-wide anti-discrimination programme was developed by the anti-discrimination office in Siegen (NFPDE0172) (cf. Antidiskriminierungsbüro Siegen 2000b; PUBDE0040).

One aspect of this model project that deserves special mention is the development of a computer software for a differentiated and standardised registration of discrimination cases (ACTDE0146).

SETTING UP PUBLIC ANTI-DISCRIMINATION CENTRES

Whereas North-Rhine Westphalia and some other federal states, as well as several local communities, have for several years been trying to organise and systematize anti-discrimination work, the federal level has so far not developed a comprehensive concept for anti-discrimination work. As for the state and local level, one major achievement has been the setting up of anti-discrimination centres at the offices of local commissioners for foreign resident affairs and integration. One example is the anti-discrimination centre at the office of the Brandenburg State Commissioner for Foreign Resident Affairs (NFPDE0082). This anti-discrimination centre offers advice and counselling for victims of discrimination or establishes contacts with local advice centres. It also organises anti-discrimination projects and compiles and publishes studies or reports on discrimination. To cite only one example, we refer to a project entitled FRIZZ (Helping migrants to gain free access to goods and services; ACTDE0051), which aims at breaking down discrimination at the workplace and in society. The project, set up in October 2001 and funded by the Xenos-programme (1B0007) of the federal government and EU Social

[32] 1 Euro = 1,95583 DM

[33] In their publication, Clayton and Wehrhöfer have presented an evaluation of the anti-discrimination programme in North-Rhine Westphalia (analysing projects during the period 1997 – 1999). The funding for a part of these projects has been extended by the state government (cf. ibid.).

Funds, develops and tests anti-discrimination programmes (e.g. further training in inter-cultural communication, agreements with employers, public relations work). The project brings together employers and employers' associations, trade unions, skilled crafts associations and police forces in Brandenburg. Tried and tested measures are to be adopted by project partners when the first phase of project expires after three years at the end of the year 2004. The office of the State Commissioner for Foreign Resident Affairs will then offer further advice for implementing projects (for further details, cf. http://www.antidiskriminierung-brandenburg.de/).

INTERCULTURAL TRAINING FOR LOCAL ADMINISTRATION STAFF

Reports by anti-discrimination offices have shown that contacts with local administrations are one major source of perceived discrimination. This is why the "intercultural opening" of local administrations is one of the main priorities of anti-discrimination work. Intercultural opening comprises the employment of staff with a migration background as well as further training programmes for administrative staff. In recent years, a large number of municipalities have conducted inter-cultural or anti-racism training programmes. One example that has been particularly successful is a project entitled V.I.A./Integra (ACTDE0341) in Offenbach. This three-year project was funded by the state of Hesse with the help of EU Social Funds. The main aim was to achieve an intercultural opening of the local administration, but not by means of an anti-discrimination campaign, but by incorporating it into the quality standards of the municipality's staff and organisation policies. Employees at local authorities (e.g. offices for public welfare, foreign residents, public housing) were offered further training seminars on a voluntary basis. The main aim was to transfer intercultural skills into the daily work of administrative staff, as part of a long-term strategy of intercultural opening.

Qualification measures were also offered to staff of non-profit organisations, employment associations, advice and job centres etc. The main goal was to make all service providers more accessible for migrants. The project has thus reached local authorities as well as other institutions working face-to-face with migrants. It has to be noted, however, that the project has probably only reached employees that had already been aware of discrimination issues.

FURTHER TRAINING FOR MULTIPLIERS

Further training in anti-discrimination work does not only mean offering training seminars to employees in order to improve their inter-cultural competence, but also providing further training for multipliers and disseminators. These training measures include intercultural competence as well as legal matters. The educational organisation of the German Association of Trade Unions (DGB) has for several years been offering seminars on "migration and qualification". The addresses are mainly trade union representatives and shop stewards as well as other multipliers (cf. e.g. 1C0004; 1C0005; 4C0006; ACTDE0060). One course, for example, deals with "Using the law against discrimination" (ACTDE0340), which aims at realising existing legal entitlements for equal treatment.

LAWYERS AGAINST THE RIGHT

Several German **lawyers** also concern themselves with the topics of right-wing radicalism and xenophobia. Their work is not only limited to the interpretation of the law or bills, but they actively attempt to support victims of xenophobic violence as well. One may mention here the association 'Lawyers Against the Right' [own translation] (**Anwälte gegen Rechts; 4C0022**) (cf. http://www.anwaelte-gegen-rechts.de/) or the 'DAV Foundation Against the Extreme Right-wing and Violence' [own translation] (**DAV Stiftung contra Rechtsextremismus und Gewalt;**)
(cf. http://www.anwaltverein.de/03/02/2000/32_00.html), established by the Association of German Lawyers (DAV) [own translation] (Deutscher Anwalt Verein; NFPDE0225), with the purpose of allowing victims of extreme right-wing and politically motivated violence to quickly seek their rights through legal assistance.

STATE TREATY BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE CENTRAL COUNCIL OF JEWS IN GERMANY

On the whole, the number of Good-Practice projects in the legislation area is quite high, notwithstanding the fact that Germany has so far failed to develop a nation-wide approach to anti-discrimination work. It can be stated, however, that discrimination issues have more and more come to the forefront of political debates, leading to the establishment of a new focus in anti-discrimination work: measures that support victims of discrimination to act on their own account (cf. Addy 2003, S. 5; PUBDE0500). These measures include the intercultural opening of organisations as well as advice centres and public-relations work.

One important step, for example, has been the signing of a state treaty between the Federal Republic of Germany and the Central Council of Jews in Germany in 2003 (PUBDE0110). This agreement for the first time creates a permanent basis for the legal and financial relations between the German state and the Jewish community. Under the agreement, both sides have agreed to cooperate continuously as equal partners (Article 2). In addition, the federal government has agreed to provide financial assistance to the Jewish community. According to Article 2, the Central Council of Jews in Germany will receive an annual subsidy of € 3 million from the federal government to support the council in "fulfilling its cultural, social and integration contributions" to German society. The annual assistance is to replace the current subsidy of € 1 million which has so far been paid by the government each year on a voluntary basis. Paul Spiegel, the President of the Council of Jews in Germany, has expressed the view that the financial regulations do not form the core of the agreement. In his view, it is far more important that Germany has vowed to recognise and support the Jewish community: "The agreement does not only acknowledge our existence, but also underlines the political support of the government and parliament for the Jewish community living in Germany" (Paul Spiegel, as quoted in Bundesministerium des Innern 2003, p. 4).[34]

[34] The Jewish Community in Germany has currently almost 100,000 members (cf. Bundesministerium des Innern 2003, p. 5). The actual number of Jewish residents, however, is higher, as not all of them are members of local Jewish communities. It is impossible to state the precise figure as ethnic features are excluded from statistical registration by German law.

9. Conclusions

Our analysis of the legal regulations concerning migration, integration and anti-discrimination has shown that Germany has achieved several improvements over recent years. In addition to legal reforms and amendments aiming at fostering the integration of migrants, migration and integration have become two of the major topics in public debate and social-science research, with a large number of studies being published. Politicians and decision-makers, from the federal to the state and the local level, have also taken many initiatives to further the interests of migrants.

Anti-discrimination legislation, on the other hand, presents a completely different picture. Even though there are specific discrimination bans in several acts and directives, the federal parliament has until the time of reporting failed to pass a comprehensive anti-discrimination act and to transfer EU anti-discrimination directives into national law. In consequence, there is so far no legal basis for victims of discrimination to sue in case they feel discriminated against, e.g. when they try to rent a flat. Furthermore, there is no national registration system or advice centre for cases of discrimination. It is therefore impossible to obtain reliable statistical data on the extent and development of discrimination.

There is, it is true, a large number of Good-Practice initiatives in the field of legislation, lobbying for comprehensive anti-discrimination legislation and supporting victims of discrimination, but without the necessary legal foundation, many of their efforts will continue to be comparatively ineffective.

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11. Annexes

Annex I - Tables

LIST OF TABLES

Table 1: Foreign nationals and total population of Germany 1991 - 2002

year	total population [1]	foreign population [1]	percentage of foreign nationals	change in foreign population (in %) [2]
1991 [3]	80,274,600	5,882,267	7.3	-
1992	80,974,600	6,495,792	8.0	+10.4
1993	81,338,100	6,878,117	8.5	+5.9
1994	81,538,600	6,990,510	8.6	+1.6
1995	81,817,500	7,173,866	8.8	+2.6
1996	82,012,200	7,314,046	8.9	+2.0
1997	82,057,400	7,365,833	9.0	+0.7
1998	82,037,000	7,319,593	8.9	-0.6
1999	82,163,500	7,343,591	8.9	+0.3
2000	82,259,500	7,296,817	8.9	-0.6
2001	82,440,400	7,318,628	8.9	+0.3
2002	82,536,700	7,335,592	8.9	+0.2

Source: Federal Statistical Office

1) as of 31st December. Registered as foreigners are all persons who do not possess the German nationality (including stateless persons and persons whose nationality is not clear). Persons with multiple citizenship, who are nationals both of Germany and an additional country, are registered as German citizens.

2) annual change, i.e. compared to previous year.

3) since 31st December 1991, data refers to German territory as of 3rd October 1990.

Table 2: Non-German Residents in Germany according to the main nationalities 1990 - 2002

	Total	Turkey	Yugoslavia[2]	Italy	Greece	Poland	Croatia	Bosnia-Herzegovina	others
1990	5,342,532	1,694,649	662,691	552,440	320,181	242,013	-	-	1,870,558
1991[1]	5,882,267	1,779,586	775,082	560,090	336,893	271,198	-	-	2,159,418
1992	6,495,792	1,854,945	915,636	557,709	345,902	285,553	82,516	19,904	2,433,627
1993	6,878,117	1,918,400	929,647	563,009	351976	260,514	153,146	139,126	2,562,299
1994	6,990,510	1,965,577	834,781	571,900	355,583	263,381	176,251	249,383	2,573,654
1995	7,173,866	2,014,311	797,754	586,089	359,556	276,753	185,122	316,024	2,638,257
1996	7,314,046	2,049,060	754,311	599,429	362,539	283,356	201,923	340,526	2,722,902
1997	7,365,833	2,107,426	721,029	607,868	363,202	283,312	206,554	281,380	2,609,986
1998	7,319,593	2,110,223	719,474	612,048	363,514	283,604	208,909	190,119	2,831,702
1999	7,343,591	2,053,564	737,204	615,900	364,354	291,673	213,954	167,690	2,899,252
2000	7,296,817	1,998,534	662,495	619,060	365,438	301,366	216,827	156,294	2,976,803
2001	7,318,628	1,947,938	627,523	616,282	362,708	310,432	223,819	159,042	3,070,884
2002	7,335,592	1,912,169	591,492	609,784	359,361	317,603	230,987	163,807	3,150,389

Source: Federal Statistical Office

1) since 1991, data refers to German territory as of 3rd October 1990.
2) Yugoslavia in 1992 comprises Serbia, Macedonia and Montenegro, from 1993 only Serbia and Montenegro.

Table 3: Residence status of non-German residents of selected nationalities (31st December 2002)

Nationality	Residence status[3]						
		Residence permit		Residence	Residence	Residence	Toleration
	Total [2]	limited	unlimited	entitlement	allowance	authorisation	certificate
Turkey	1,912,169	634,920	652,176	450,830	10,298	31,244	15,032
Yugoslavia [1]	591,492	110,427	151,598	89,060	4,115	45,506	93,256
Croatia	230,987	40,398	93,347	77,414	7,819	1,455	1,830
Bosnia-Herzegovina	163,807	38,900	41,177	26,536	3,591	23,453	16,607
Macedonia	58,250	19,628	19,452	11,229	1,211	1,488	1,590
Slovenia	20,550	1,995	9,640	6,765	1,285	45	54
Poland	317,603	89,382	89,077	8,531	56,483	5,735	1,170
Russian Federation	155,583	53,536	62,852	482	11,581	2,502	3,340
Iran	88,711	17,452	29,946	7,097	2,599	9,114	3,425
Romania	88,679	22,333	18,350	740	15,989	2,156	931
Ukraine	116,003	22,357	73,735	129	8,212	959	815
Vietnam	87,207	27,025	22,649	5,896	1,820	9,575	8,795
Morocco	79,838	29,560	24,352	8,986	7,712	324	454
Afghanistan	69,016	9,630	14,123	256	297	21,675	9,606
Sri Lanka	43,634	14,432	9,753	3,353	353	4,996	2,359
Hungary	55,953	10,986	15,220	4,317	17,422	276	74
Libanon	47,827	12,268	7,588	374	900	13,037	5,282
China	72,094	17,308	5,822	1,088	33,905	1,634	3,177
Tunesia	24,243	8,555	7,469	2,588	1,929	182	160
Bulgaria	42,419	7,498	5,805	1,077	16,490	226	170
India	41,246	13,657	7,040	3,334	4,902	324	2,085
Iraq	83,299	4,341	10,782	82	158	43,079	3,952
Kazakhstan	53,551	31,851	12,459	9	928	1,362	713

Pakistan	34,937	11,047	7,613	1,886	1,092	1,459	2,767
Syria	28,679	5,210	4,465	173	1,340	4,224	4,491
Thailand	45,457	18,310	18,718	2,449	1,982	81	125
Total	**7,335,592**	**1,648,949**	**1,996,799**	**783,048**	**325,061**	**264,032**	**226,547**

Source: Federal Statistical Office

1) Category includes all persons registered by the Central Register for Foreigners as Yugoslavian nationals (on a set date).

2) The difference between the sum of different residence titles and the category "total" is, at least partly, due to the fact that EU nationals are virtually exempt from residence regulations. About 397,282 EU nationals had a limited Residence Permit – EC, a further 516,075 persons an unlimited Residence Permit – EC.

3) Foreign-resident law in Germany differentiates between the following residence titles:

A Residence Entitlement (Aufenthaltsberechtigung) can be granted on application to foreign residents who have been legal residents of Germany for eight years, provided that further requirements are met (e.g. that applicants are able to earn their own living without resorting to welfare payments). Residence entitlements are the most secure residence title since they are unlimited, i.e. there are no restrictions concerning the duration and place of residence.

A Limited Residence Permit (befristete Aufenthaltserlaubnis) forms the basis for a subsequent permanent residence status. In accordance with the duration of the residence, the residence status becomes legally more secure. Residence permits are granted unrelated to the purpose of residence in Germany.

An Unlimited Residence Permit (unbefristete Aufenthaltserlaubnis) constitutes the first step towards a permanent residence status. The main condition is that the applicants have been legal residents (with a limited residence permit) for at least five years. If further requirements are met, applicants are entitled to receive this residence status.

A Residence Allowance (Aufenthaltsbewilligung) allows residence for a clearly defined purpose; consequently, it limits the duration of residence (e.g. for university students, contract workers).

A Residence Authorisation (Aufenthaltsbefugnis) is granted because of international law, or for humanitarian or political reasons. It can only be extended if these humanitarian grounds continue to apply. This residence status is granted to, among others, quota and civil-war refugees.

The Toleration Certificates (Duldung) constitutes a further legal title which, however is not classified as residence title. A toleration certificate provides temporary protection against deportation, without repealing the general obligation to leave the country.

Table 4: Naturalisation according to former nationalities 1995 - 2002

	Total	Turkey	Iran	Yugoslavia	Afghanistan	Morocco	Libanon	Croatia	Bosnia-Herzegovina	Vietnam
1995	71,981	31,578	874	3,623	1,666	3,397		2,637	2,010	3,430
1996	86,356	46,294	649	2,967	1,819	3,149	784	2,391	1,926	3,553
1997	82,913	39,111	919	1,989	1,454	4,010	1,134	1,789	995	3,119
1998	106,790	53,696	1,131	2,404	1,118	4,971	1,692	2,198	3,469	3,452
1999	143,267	103,900	1,863	3,608		4,980	2,515	1,648	4,238	2,597
2000	186,688	82,861	14,410	9,776	4,773	5,008	5,673	3,316	4,002	4,489
2001	178,098	75,573	12,020	12,000	5,111	4,425	4,486	3,931	3,791	3,014
2002	154,547	64,631	13,026	8,375	4,750	3,800	3,300	2,974	2,357	1,482

Source: Federal Statistical Office

Table 5: Migration in- and outflows across the borders of the Federal Republic of Germany (1992-2002)

Year	Inflows			Outflows			Net migration (inflows – outflows)	
	Total	of which: non-Germans	Percentage	**Total**	of which: non-Germans	Percentage	**Total**	of which: non-Germans
1992	**1,502,198**	1,211,348	80.6	**720,127**	614,956	85.4	**+782,071**	+596,392
1993	**1,277,408**	989,847	77.5	**815,312**	710,659	87.2	**+462,096**	+279,188
1994	**1,082,553**	777,516	71.8	**767,555**	629,275	82.0	**+314,998**	+148,241
1995	**1,096,048**	792,701	72.3	**698,113**	567,441	81.3	**+397,935**	+225,260
1996	**959,691**	707,954	73.8	**677,494**	559,064	82.5	**+282,197**	+148,890
1997	**840,633**	615,298	73.2	**746,969**	637,066	85.3	**+93,664**	-21,768
1998	**802,456**	605,500	75.5	**755,358**	638,955	84.6	**+47,098**	-33,455
1999	**874,023**	673,873	77.1	**672,048**	555,638	82.7	**+201,975**	+118,235
2000	**840,771**	648,846	77.2	**673,340**	562,380	83.5	**+167,431**	+86,466
2001	**879,217**	685,259	77.9	**606,494**	496,987	81.9	**+272,723**	+188.272
2002	**842,543**	658,341	78.1	**623,255**	505,572	81.1	**+219,288**	+152.769

Source: Federal Statistical Office

Table 6: Migration in- and outflows of EU-nationals to and from Germany: 1990 - 2001[1]

	total inflows	inflows of EU-nationals[1]	percentage	total outflows	outflows of EU-nationals[1]	percentage
1990[2]	1,256,593	118,421	9.4	574,378	85,108	14.8
1991	1,198,978	128,142	10.7	596,455	96,727	16.2
1992	1,502,198	120,445	8.0	720,127	94,967	13.2
1993	1,277,408	117,115	9.2	815,312	99,167	12.2
1994	1,082,553	139,382	12.9	767,555	117,486	15.3
1995	1,096,048	175,977	16.1	698,113	140,113	20.1
1996	959,691	171,804	17.9	677,494	154,033	22.7
1997	840,633	150,583	17.9	746,969	159,193	21.3
1998	802,456	135,908	16.9	755,358	146,631	19.4
1999	874,023	135,268	15.5	672,048	141,205	21.0
2000	841,158	130,683	15.5	674,038	126,360	18.7
2001	879,217	120,590	13.7	606,494	120,408	19.9

Source: Federal Statistical Office

1) Nationals of the following 14 EU member states: Austria, Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom (German citizens are not included).

2) as of 1990: the "old" Laender.

Table 7: Decisions of the Federal Office for the Recognition of Foreign Refugees between 1990 and 2002

year	number of decisions	entitled to political Asylum according to Art. 16/16a Basic Law	% [1]	protected against deportation according to §51Par.1 Aliens Act	% [2]	impediments to deportation according to §53 Aliens Act[3]	%	rejected	% [4]	other completed cases[5]	% [6]
1990	148,842	6,518	4.4	*n.a.*	*n.a.*			116,268	78.1	26,056	17.5
1991	168,023	11,597	6.9	*n.a.*	*n.a.*			128,820	76.7	27,606	16.4
1992	216,356	9,189	4.2	*n.a.*	*n.a.*			163,637	75.6	43,530	20.1
1993	513,561	16,396	3.2	*n.a.*	*n.a.*			347,991	67.8	149,174	29.0
1994 [7]	352,572	25,578	7.3	9,986	2.8			238,386	67.6	78,622	22.3
1995	200,188	18,100	9.0	5,368	2.7	3,631	1.8	117,939	58.9	58,781	29.4
1996	194,451	14,389	7.4	9,611	4.9	2,082	1.1	126,652	65.1	43,799	22.5
1997	170,801	8,443	4.9	9,779	5.7	2,768	1.6	101,886	59.7	50,693	29.7
1998	147,391	5,883	4.0	5,437	3.7	2,537	1.7	91,700	62.2	44,371	30.1
1999	135,504	4,114	3.0	6,147	4.5	2,100	1.6	80,231	59.2	42,912	31.7
2000	105,502	3,128	3.0	8,318	7.9	1,597	1.5	61,840	58.6	30,619	29.0
2001	107,193	5,716	5.3	17,003	15.9	3,383	3.2	55,402	51.7	25,689	24.0
2002	130,128	2,397	1.8	4,130	3.2	1,598	1.2	78,845	60.6	43,176	33.2

Source: Federal Office for the Recognition of Foreign Refugees (BAFl: Statistics on Administrative Cases)
1) In order to obtain the rate of approval, the total of individual cases is divided by the number of people entitled to asylum.
2) Percentage of asylum applicants that are protected against deportation, in relation to total of asylum decisions.
3) Since 1999, impediments to deportation according to §53 Aliens Act have been statistically registered as a separate category. In the years 1995 to 1998, respective figures were not included in the total of decisions.
4) Percentage represents quotient of rejections and total of asylum decisions.
5) This category comprises, among other things, withdrawn applications (e.g. because of return or transit migration).
6) Proportion of "other completed cases" to total decisions on persons.
7) Only since April 1994 have persons that are protected against deportation according to §51 Par.1 Aliens Act been statistically registered as a separate category. In previous years, their percentage amounted to 0.3% to 0.5% of all decisions (figures based on manual count).

Table 8: Asylum applicants from selected source countries: 1990 - 2002

Year	Total	Europe	Africa	America and Australia[2]	Asia	Stateless persons and others
1990	193,063	101,631	24,210	402	60,900	5,920
1991[1]	256,112	166,662	36,094	293	50,612	2,451
1992	438,191	310,529	67,408	356	56,480	3,418
1993	322,599	232,678	37,570	287	50,209	1,855
1994	127,210	77,170	17,341	214	31,249	1,236

1995[3]	127,937	67,411	14,374	235	45,815	102
1996	116,367	51,936	15,520	380	45,634	2,897
1997	104,353	41,541	14,126	436	45,549	2,701
1998	98,644	52,778	11,458	262	31,971	2,176
1999	95,113	47,742	9,594	288	34,874	2,615
2000	78,564	28,495	9,593	338	37,239	2,899
2001	88,287	29,473	11,893	263	45,622	1,027
2002	71,127	25,631	11,768	187	32,746	792

Sources: Federal Office for the Recognition of Foreign Refugees, Federal Ministry of the Interior
1) Since 1991 figures are for the whole of Germany.

2) 1997 and 1998 America only (without Australia).

3) Since 1995, the BAFl statistics differentiate between initial and follow-up applications. For the years after 1995 data refers to initial applications.

Table 9: Migration inflows of Spätaussiedler according to source territory: 1990 - 2002

Source territory	**1990**	**1991**[3]	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**
Poland	133,872	40,129	17,742	5,431	2,440	1,677	1,175	687	488	428	484	623	553
Former Soviet Union	147,950	147,320	195,576	207,347	213,214	209,409	172,181	131,895	101,550	103,599	94,558	97,434	90,587
Yugoslavia[1]	961	450	199	120	182	178	77	34	14	19	0	17	4
Romania	111,150	32,178	16,146	5,811	6,615	6,519	4,284	1,777	1,005	855	547	380	256
(Former) CSSR	1,708	927	460	134	97	62	14	8	16	11	18	22	13
Hungary	1,336	952	354	37	40	43	14	18	4	4	2	2	3
other countries[2]	96	39	88	8	3	10	6	0	3	0	6	6	0
Total	**397,073**	**221,995**	**230,565**	**218,888**	**222,591**	**217,898**	**177,751**	**134,419**	**103,080**	**104,916**	**95,615**	**98,484**	**91,416**

Source: Federal Administrative Office (Bundesverwaltungsamt), Federal Ministry of the Interior
1) Including Croatia, Slovenia, Bosnia-Herzegovina and Macedonia, which all gained independence in 1992 and 1993 respectively.
2) "Other countries" plus inflows to Germany via a third country.
3) Figures after January 1, 1991 are for East and West Germany together.

Table 10: Investigations according to the elements of an offence 1995 to 2000

Crimes	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
Propaganda crimes §§ 86, 86a Penal Code	8,291	9,363	11,158	12,827	10,966	15,824
Incitement of the people and glorification of violence §§ 130, 131 Penal Code	2,422	2,381	2,592	2,917	2,533	5,672
Crimes resulting in death §§ 211, 212 Penal Code	23	15	17	21	12	16
Bodily harm §§ 223 ff. Penal Code	617	634	695	774	915	1,060

Violation of the public peace §§ 125, 125a Penal Code	211	442	507	395	271	331
Arson §§ 306 ff. Penal Code	59	46	33	52	33	47
Anti-semitic actions (desecration of graves etc.)	319	238	321	224	331	540
Other crimes	1,678	1,277	1,320	1,514	1,421	1,785
Total number	13,620	14,396	16,643	18,724	16,482	25,275
Total of above due to offences against foreigners[1]	2,389	2,160	2,495	2,480	2,180	3,083

Source: Printed matter of German parliament 14/4464, 14/8703
1) Since the second half of 1999 the federal state Brandenburg does not register criminal acts against foreigners statistically any more.

Annex II - Migration Law (Law Controlling and Limiting Immigration, Regulating Residency and Integration of EU-Citizens and Third-Country Nationals)

Outline of legislation

In the following, we will provide an outline of the main points of the **new Migration Law** (*Zuwanderungsgesetz*), which was supposed to take effect on 1st January 2003. However, as the law has been declared invalid for formal reasons by the Federal Constitutional Court on 18th December 2002, the government introduced the law, which has not been modified, again at the beginning of the year. As at the time of reporting the bill has only been passed by the *Bundestag* (first chamber of the federal parliament), but not by the *Bundesrat* (second parliamentary chamber representing the federal states), it is up to a mediating committee of both houses of parliament to work out a **compromise** between the government and the opposition.

Formally, the migration law is a so-called "article law", i.e. it comprises numerous amendments to various existing laws such as the Asylum Procedure Act, the Asylum Seekers Benefits Act and the Citizenship and Nationality Act. The migration law comprises 15 articles, centred around Art.1, which contains new regulations on residence, gainful employment and integration of non-German residents (**Residence Act** – *Aufenthaltsgesetz (AufenthG)*). The new migration law aims at a comprehensive reform of various laws relating to non-German residents, even though it adopts the majority of existing regulations. In contrast to earlier legislation, the migration law incorporates questions relating to the gainful employment of non-German residents into residence law, in order to create a complete and clear list of all legal residence and immigration titles. It also emphasises the goal of fostering integration.

§1 of the Residence Act (*AufenthG*) describes the goal of the legislation as follows: "This law aims at channelling and limiting inflows of non-German residents. It allows and regulates migration inflows on the basis of Germany's integration capacity and its national interests concerning economic development and the labour market. Furthermore, the law fulfils Germany's humanitarian obligations. It thus aims at regulating inflows, residency, gainful employment and integration of foreign residents."

The new **residence law** is no longer based on residence titles, but on the motives underlying residence in Germany (education and training, gainful employment, family migration, humanitarian reasons). To this end, the law has reduced the number of residence titles to only two: a (temporary) residence permit (*Aufenthaltserlaubnis*) and a (permanent) settlement permit (*Niederlassungserlaubnis*). The law thus replaces the five residence titles currently in effect.[35] The new **residence permit** constitutes a limited

[35] They comprise the following five titles: residence entitlement, limited and unlimited residence permit, residence allowance and residence authorisation. In addition, so-called "toleration certificates" will also be abolished; legally, they do not constitute a residence title, but a suspension of somebody's obligation to leave the country by means of deportation. The "leave of residence" (according to §55 Asylum Procedure Code), on the other hand, will be retained; legally, it also not considered to be a residence title. A leave of residence

residence title (§8 *AufenthG*), with the possibility of re-issuing it at a later stage with another legal title (it is therefore a so-called "first-step" title). The **settlement permit**, on the other hand, is permanent and does therefore include no restrictions or conditions (§9 *AufenthG*). It also entitles foreign residents to take up gainful employment.

The law comprises generous interim regulations for third-country nationals who are already residents of Germany. According to §99 Par.1 *AufenthG*, unlimited residence permits and entitlements that have been granted to these persons will remain in force. In effect, this regulation would "improve the legal status of about 2 million third-country nationals over night" (cf. Davy 2002, p.174; as to distribution of various residence titles, cf. Table 3 in chapter 12.2).

LABOUR MIGRATION

In this area, the law sets out to replace current regulations, which are mainly to be found in the Decree on Exceptions to the Ban on Allocating Foreign Labour (*Anwerbestoppausnahmeverordnung*[36]), with more flexible rules. According to §18 *AufenthG*, foreign nationals can be granted a residence permit in order to take up employment in Germany in cases of **labour market bottlenecks**. Conditions are that the Federal Labour Office has given its assent or that a federal decree has been passed which is based on a bi-lateral agreement with another country.

The law also simplifies so-called **prior entitlement checks**[37] which have to be carried out by labour offices, i.e. labour offices are not permitted to grant work permits to non-German residents for job vacancies if there are German applicants (or European nationals with a comparable legal status). In future, prior entitlement checks are to take regional factors into consideration. Moreover, work and residence permits are to be granted by means of one administrative act only, provided that the labour authorities have given their prior assent. These simplifications would save applicants a lot of time and effort as, under current law, they have to complete two separate administrative procedures, one for the residence and the other for the work permit.

The law also allows **new forms of labour migration**. A small number of **highly qualified specialists** (e.g. IT experts, engineers, business executives and scientists) will be allowed to live and work in Germany. They may be granted a permanent residence permit immediately if they fulfil certain requirements (§19 *AufenthG*). These regulations will replace two earlier directives that were introduced in 2000; commonly referred to as "Green Card" regulations, they allow authorities to grant work and residence permits to IT specialists for a maximum period of five years.

In addition to highly qualified specialists, the new law also permits the introduction of an optional selection process for admitting labour migrants, which is based on a **points**

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is granted to asylum seekers for the duration of asylum procedures. It is restricted to the administrative district of the regional authority asylum seekers have been allocated to.

[36] This decree lists exceptions to the general recruitment ban imposed in 1973. Under the decree, certain groups of foreign labour can, under some conditions, be granted a, in most cases, limited residence and work permit: e.g. contract and seasonal workers, and some professions such as artists or university teachers.

[37] Persons with prior entitlement include German citizens as well as nationals of EU member states, EEA member states or third-country nationals who are not subject to any legal employment restrictions. The latter group comprises, e.g., foreign residents who were born in Germany and have been granted an unlimited residence permit, or foreign nationals who have been granted a residence entitlement.

system (§20 *AufenthG*).[38] If such a selection process is to be initiated, the Federal Government has to pass a directive, with the approval of both houses of parliament, the *Bundestag* and the *Bundesrat*, defining the criteria according to which points can be allocated to applicants. However, several criteria that have always to be included in such a selection process have already been listed in the new migration law: they include good health and reputation, sufficient financial resources, age, academic and vocational qualifications, job experience, marital status, language skills, existing links to Germany and country of origin (§20 Par.3 *AufenthG*).

Foreign nationals who have successfully participated in this selection process will be granted a settlement permit, which allows them to take up gainful employment. However, recruitment procedures will only be carried out if a maximum quota for labour migrants under this system has been imposed by the Federal Office for Migration and Refugees and the Federal Labour Office, after consultation with the Migration Council. Depending on the situation on the German labour market, it is also possible to allow no labour migration at all. In a public statement, the Federal Interior Minister has declared that he expects no admissions under the points system for labour migrants before the year 2010.

Foreign graduates will be able to commence employment after obtaining approval from the authorities. They will also receive a one-year residence permit to enable them to seek work. This regulation aims at preventing them from moving to other industrialized countries. Until now foreign graduates have generally had to leave Germany after completing their studies.

According to §21 Par.1 *AufenthG,* foreign nationals who are self-employed can also be granted a residence permit, provided that this is expected to have a positive effect on economic growth and employment. Respective administrative decisions are to be based, above all, on the business plan and the entrepreneurial experience of the applicant, together with the amount of their planned capital investment and its expected effects on the labour market. In general, granting residence permits to self-employed businesspersons will be considered to be in the national interest if their investment amounts to at least € 1 million or creates at least ten jobs.

FAMILY MIGRATION

Under the new law (§32 *AufenthG*), **children** of foreign nationals will be allowed to join their parents in Germany up to the age of 18 (as opposed to 16 years under current law). Conditions are that children migrate to Germany together with their parents, have sufficient German language skills, or that one parent has been recognised as a refugee, in accordance with the Geneva Convention, a highly qualified specialist or a labour migrant under the new points system. In all other cases, children are only allowed to join their non-German parents up to the age of 12, but authorities are entitled to grant special permits. For example, unmarried children who are minors can be granted a residence permit if this is in the "interest of the child" or the "family situation".

Entitlements of **spouses or registered partners** to take residence in Germany depend on the residence title of the foreign national who already lives in Germany (§30 *AufenthG*).

[38] The system gives preference to nationals of countries that have applied for EU membership and have already entered formal admission negotiations (§20 Par.2 *AufenthG*).

Spouses of a non-German resident will be granted a residence permit if their partner is in possession of a settlement permit, has been in possession of a residence permit for at least five years, or if they were already married at the time when the residence permit was granted. Family migration entitlements also exist for foreign nationals who have been recognised as entitled to political asylum or as refugees under the Geneva Convention. If such a marriage is divorced, foreign nationals (who have joined a resident of Germany) will be granted their **own residence permit** if they have lived together as a married couple in Germany for at least two years (§31 *AufenthG*). However, in "cases of hardship", authorities can shorten the two-year waiting period.

Family members who are entitled to join their family in Germany enjoy the same labour market entitlements as the foreign resident that they are joining. Until now, a one-year waiting period applies in these cases.

On principle, a residence permit for the sake of family migration can be refused if the family member already living in Germany depends on welfare payments for this living (§27 Par.3 *AufenthG*).

ADMISSION FOR HUMANITARIAN REASONS

The new residence law sets out to create **only one residence title** for all types of humanitarian protection, which includes a (limited) residence permit. Other legal differences among groups of refugees protected for humanitarian reasons (recognised asylum seekers, refugees under the Geneva Convention, persons protected by law against deportation and persons who cannot be repatriated for other legal or factual reasons) will remain (§25 *AufenthG*).

The law aims at bringing in line the residence status granted to foreign nationals who are protected against deportation under the Geneva Convention, with that granted to recognised asylum seekers according to Art.16a Basic Law (§25 Par.1 and 2 *AufenthG*). In effect, this amendment would confer the same labour market entitlements on both refugees with a so-called "little asylum" status ("*kleines Asyl*") and recognised asylum seekers.

Moreover, the same status is also to be transferred to refugees subject to **non-governmental and gender-specific persecution**, provided they fulfil the conditions outlined by the Geneva Convention (§60 Par.1 *AufenthG*). Under current law, these persons can only be granted the status of being protected against deportation (according to §53 *AuslG)* and a toleration certificate. In effect, the amendment would considerably improve the situation of **Geneva Convention refugees**[39], and particularly of refugees subject to non-governmental and gender-specific persecution.

Nevertheless, another amendment will render the residence status of recognised asylum seekers **more insecure**. In future, recognised asylum seekers will not immediately be granted an unlimited residence permit, but one limited to three years (§26 *AufenthG*). After the three-year period, they are legally entitled to a permanent settlement permit,

[39] In 2001, a total of 5,716 applicants were recognised as asylum seekers (a recognition quota of 5.3%), but no less than 17,003 persons (a recognition quota of 15.9%) were recognised as protected against deportation under §51 Abs.1 *AuslG* (which is the equivalent of the Geneva Convention refugees status) (cf. www.bafl.bund.de/bafl/template/index_statistiken.htm).

provided that the Federal Office for Migration and Refugees decides that there are no reasons for repealing or overturning the recognition.

Persons **protected against deportation** (under §53 *AuslG*) will in future be granted a residence permit (§25 Abs.3 *AufenthG*). Family migration can be allowed under international law or for humanitarian reasons, and labour market access will also be granted (prior entitlement checks notwithstanding). Furthermore, foreign residents who are legally obliged to leave the country can nevertheless be granted a residence permit if their repatriation is impossible for legal or factual reasons (§25 Abs.5 *AufenthG*).

However, the granting of residence permits has been ruled out for foreign residents who are **personally responsible** for obstacles to their repatriation, e.g. by submitting false personal data or by misleading authorities with regard to identity or nationality. These persons are to be excluded from family migration entitlements as well as child and education benefits. Moreover, they will only be granted welfare payments according to the Asylum Seekers Benefits Act, i.e. payments are reduced in comparison to other recipients. Finally, authorities will make increased efforts to repatriate persons who intentionally try to evade their obligation to leave the country. **Deferments of deportation** will continue to be certified, but without granting a toleration certificate.

Furthermore, the law also includes hardship regulations, according to which foreign residents can be granted a residence permit if a representative of a state government submits an application to local authorities in **cases of hardship** (§25 Par.4a *AufenthG*).

INTEGRATION

§43 Par.1 *AufenthG* states the goal of fostering the economic, cultural and social integration of legal and long-term foreign residents of Germany. This amendment will therefore, for the first time, incorporate the goal of integration into residence law. The law states that this change of policy is in response to the fact "that over the last decades a large number of foreign residents has settled down in Germany both legally and permanently. In future, too, qualified immigrants and their families will settle down in Germany for good, building a new life for themselves and their families" (Federal Government draft, p.185).

The section of the residence law dealing with "integration" is based on the principle of **"providing support and making demands (*Fordern und Fördern)*"**. §43 Par. 1 *AufenthG* explains: "Integration is based on the principle of mutuality and interchange between migrants and the receiving society. Migration inflows do not only make it necessary for migrants to adapt to a new life in unfamiliar surroundings, it also makes demands on society to provide support and orientation" (ibid.)

The law creates both an entitlement to participate in integration courses (§44 Par.1 *AufenthG*) and an obligation to do so (§45 Par.1 *AufenthG*). All foreign residents who have been granted their first residence permit for reasons of employment, family migration or on humanitarian grounds are entitled to participate in such courses. Third-country nationals who have been granted a permanent settlement permit, on the other hand, are under no obligation to participate.
All entitled persons are under a legal obligation to participate if their German language skills are not sufficient for everyday oral communication. Integration courses comprise a

German **language course** and a **social studies course** teaching the fundamentals of German law, culture and history (§43 Par.3 *AufenthG*). The courses include offers for child-care during lessons in order to ensure that all entitled persons are actually able to participate. Migrants who participate successfully in these courses can have their waiting periods for naturalisation shortened from eight to seven years. A refusal to participate, on the other hand, will have an impact on administrative decisions to extend residence permits (§8 Par.3 *AufenthG*).

Furthermore, the new migration law envisions a new **Federal Office for Migration and Refugees (BAMF)**, which will succeed the Federal Office for the Recognition of Foreign Refugees (BAFL), and be responsible for several additional matters (www.bafl.de or www.bamf.de). According to §75 *AufenthG*, the new agency will have the following responsibilities:

- processing asylum applications
- allocating Jewish immigrants from the former Soviet Union to federal states
- co-ordinating the exchange of data on labour migrants between local authorities, labour offices and German embassies abroad
- processing applications for labour migration under the points system
- advising the Federal Government in integration programmes
- compiling information packages on integration projects for foreign residents and ethnic German immigrants (*Aussiedler*)
- conducting integration courses via private and public institutions
- updating the Central Register on Foreigners
- implementing programmes for the voluntary return of migrants.

Finally, the new migration law also calls for setting up a new independent **Expert Panel for Migration and Integration** (§76 *AufenthG*), which will publish an annual report on migration in- and outflows and the current capacity for inflows and integration (www.zuwanderungsrat.de). The expert panel, which is to comprise seven members, will also publish a regular report on whether it is advisable to allow inflows of labour migrants according to the points system, and recommend a maximum number of migrants.

Evaluation of new migration law

In the following, we will summarise the views various organisations have expressed regarding the new migration law (e.g. *Pro Asyl*, amnesty international, Berlin Refugees' Council, charitable organisations, Association of German Labour Unions (*DGB*), employers' associations, *CDU/CSU*[40] (the main opposition parties), Church representatives and the Federal Government´s Commissioner for Foreigners´ Issues).

IMMIGRATION FOR HUMANITARIAN REASONS

Human rights and refugee organisations such as *Pro Asyl*, *amnesty international*, the *Berlin Refugees' Council* and several charitable organisations have welcomed the

[40] Christian Democratic Union and Christian Social Union

amendment recognising persons that have been subject to non-governmental and gender-specific persecution as entitled to political asylum. The organisations have emphasised that this broader interpretation of the Geneva Convention **closes a gap in the protection** of refugees, thus "bringing legislation in line with European standards" (*Flüchtlingsrat Berlin (Berlin Refugees' Council)* 2002, p.3) or "bringing German legislation in line with standards set by international law (*amnesty international* 2002, p.1).

However, the organisations also **criticise** that the law will lead to a deterioration of standards in some areas. For example, the legislation contains no clear definition for "refugee". The UNHCR and amnesty international therefore demand that the definitions of Art. 1A-F of the Geneva Convention on Refugees be incorporated verbatim into German asylum procedure law.

Further criticism has been levelled at the fact that the new law does not change the practice of granting toleration certificates repeatedly, i.e. certifying ever new suspensions of deportation without any time limit. In practice, these "toleration chains" create an insecure status for refugees who can only be granted a series of short-term extensions of their toleration certificate.

In addition, organisations also criticise that so-called "ex-post asylum grounds", i.e. justifications for asylum status that have been created by refugees themselves, e.g. through political activities in exile, will no longer be recognised in asylum procedure (*Pro Asyl* 2002, p. 10). Furthermore, they disagree with the **obligation to re-assess** recognitions of quota refugees and asylum seekers after a maximum term of three years. In their view, this will create the impression with foreign nationals that their residency in Germany remains insecure: "They have to face another formal procedure potentially resulting in their removal from German territory" (*Pro Asyl* 2002, p.8).

But organisations have welcomed the fact that the law includes **hardship provisions**. An introduction of such regulations, which have been added by legislators shortly before the bill was passed by parliament, had been demanded by churches, charitable organisations and human rights groups for years.

In their assessment of the new migration law, human rights and refugee organisations have also criticised that the federal government has not used the opportunity to withdraw its **reservations against the UN Convention on Children's Rights**, which the government expressed when it ratified the convention in 1992. The German government at that time had emphasised its intention to preserve "differences in its treatment of German and foreign nationals" („*die tageszeitung*", 21st November 2002, as quoted by *Asyl-Info* 12/2002).

The organisations have drawn attention especially to the situation of refugees who enter Germany as **unaccompanied minors**. Under German asylum law, refugee children are treated as adults when they are sixteen years or older, and do only have limited access to education and medical treatment.[41] *Pro Asyl* therefore draws the conclusion that the new migration law does not end "Germany's treatment of under-age refugees and thus continues to violate international law (*Pro Asyl 2002*, p.5).

[41] The number of under-age refugees living in Germany without their parents has been estimated at up to 10,000.

Another point of criticism concerns the age up to which non-German children can join their parents in Germany, which has been lowered to twelve years by the new law. The Federal Government´s Commissioner for Foreigners´ Issues has expressed the same view, expressing the view that migration flows of minors joining their parents in Germany will become fewer anyway. According to the commissioner, the **compromise** that legislators have reached regarding family migration - i.e. that the respective age limit for non-German children will rise to 18 years in some cases, but will generally be lowered to 12 years – is sufficient provided that authorities make adequate use of the discretion they have been granted "in accordance with constitutional and international law" (Federal Government´s Commissioner for Foreigners´ Issues 2002, p.101).

LABOUR MIGRATION

The **Association of German Labour Unions (DGB)** has welcomed the passing of the new migration law, emphasising that it constitutes a rejection of the outdated belief of "Germany not being a country of immigration". "Sustaining this belief has had a severely negative impact on the acceptance of immigration and integration among the general public" (*Deutscher Gewerkschaftsbund (DGB)* 2002a, p.2). However, the DGB has stated that the legislation falls short of a modern migration law.

On the positive side, the *DGB* welcomes the fact that the new residence law allows **permanent admissions** of labour migrants under the new points system. In its view, it is preferable to allow inflows of migrant labour who want to live and work in Germany permanently, as opposed to short-term labour migration. In the process, it is essential to ensure that migration inflows do no result in a **displacement** of resident workers (e.g. the long-term unemployed). Labour migration that compensates for temporary labour market shortages should therefore only to be permitted under exceptional circumstances. In addition, the *DGB* objects to migration inflows of unskilled labour. The *DGB* has also criticised that the new migration law does not resolve the problem of residents without a legal residence status. It is of the opinion that problems of illegal employment and exploitation of migrants can only by tackled by allowing regular migration inflows (*Deutscher Gewerkschaftsbund (DGB)* 2002a, p.4).

In a similar vein, **employers associations** have also welcomed the new migration law, as it is "clearly oriented towards a more flexible migration policy which is responsive to labour market needs". At the same time, employers have pointed out that there is still room for improvement, in particular that the law leaves vital questions unresolved, putting a wide range of questions at the **discretion** of state regulators and administrative bodies. In the view of employers, "this bears the risk that labour migration is dealt with too restrictively and bureaucratically and that administrative practices differ from state to state" (Federal Association of German Employers / German Industry and Trade Association 2002, p.3).

INTEGRATION

The fact that the new migration law addresses, for the first time, the issue of **integration**, for example by introducing entitlements to participate in integration courses, has met with widespread approval. But here, too, some aspects of the new law have been criticised. ***Caritas***, for example, the largest Catholic charitable organisation, disapproves of the fact that the law reduces the issue of integration to language acquisition only, without

proposing any other integration measures, e.g. advice centres that help migrants overcome social, cultural and administrative problems (*Deutscher Caritasverband* 2002, p.2). Other organisations have criticised that migrants that have been granted a permanent settlement permit have been **excluded** from participating in integration courses (*Deutscher Gewerkschaftsbund (DGB)* 2002a, p.6).

CDU/CSU, the main **opposition parties**, object to regulations that introduce obligatory integration courses for new arrivals only, and thus exclude non-German residents that already live in Germany. Moreover, they call for effective sanctions against migrants who refuse to participate in such courses: "Integration efforts have to focus on foreign residents that already live in Germany, as there are some groups among them with a clear tendency towards forming parallel societies" (Beckstein 2002).

CDU/CSU have made it clear that they are opposed to most of the new regulations. In their view, the law will **increase migration inflows considerably**, despite its declared intention of channelling and limiting immigration. The parties anticipate increased inflows of refugees for humanitarian reasons, in particular because the law recognises non-governmental and gender-specific persecution and introduces far-reaching hardship provisions. In addition, they also expect inflows of labour migrants to rise due to the planned repeal of the general recruitment ban. In summary, the opposition parties fear that the law will erode Germany's identity and transform the country into a multicultural society (ibid.).

On 18th December 2002, the Federal Constitutional Court has declared the new migration law "invalid because it has not been passed in accordance with the German Constitution" (Federal Constitutional Court, 2 *BvF* 1/02). Consequently, the legislation cannot take effect as planned on 1st January 2003. In July, several states with a CDU/CSU-led government had lodged an appeal with the Federal Constitutional Court claiming that the law had not been passed by parliament in accordance with the constitution. Their appeal did not address the question whether the content of the law was constitutional, but it focused on the fact that when the law was passed by the *Bundesrat*, the upper house of parliament, the state of Brandenburg did not cast a uniform vote. If the President of the *Bundesrat* had refused to register the Brandenburg vote as a "yes" vote, the law would not have gained a majority. According to the Federal Constitutional Court, the President of the *Bundesrat* has violated Art.78 Basic Law, which stipulates that federal states have to cast a uniform vote in the *Bundesrat*.[42]

[42] Mr. Wowereit, the mayor of Berlin, who presided at the *Bundesrat* session on 22nd March 2003, had decided that the state of Brandenburg had voted in favour of the bill, even though Mr. Stolpe, the prime minister of Brandenburg, and Mr. Schönbohm, the state's interior minister, had expressed conflicting views.

Annex III - Model Works Agreement[43]

For the combating and eradication of discrimination against migrant employees and fostering equality in the workplace.

1. Purpose and status of the works agreement
1.1In the following works agreement, practical guidelines are agreed which are to help the management and workers' representatives of the company _____ to combat or eradicate social discrimination against migrant employees in the workplace. Moreover, binding agreements are entered into in order to implement a policy of equality in the company _____.
1.2
The regulations of this works agreement have a legally binding character.
1.3
All other legal regulations regarding the implementation of the principle of equality remain unaffected.
2. Applicability of the works agreement
2.1
This works agreement is valid for the whole physical area of the company _____ and its subsidiaries and, regarding its content, for all measures relating to the selection and treatment of its employees. In addition, the regulations are also valid for access to training, further education and training within the company and for the treatment of those taking part in training courses.
2.2
All those involved should take the required measures in close co-operation with each other to realise equal opportunities in the workplace. All employees of the company _____ and its subsidiaries should profit in like manner from equal opportunities irrespective of their skin colour, race, nationality, religion, ethnic or national origin.
3. Implementation of a policy of equal opportunity within the company
3.1
The management of the company _____ obliges itself, in co-operation with the workers' council, to implement forthwith the following measures to ensure a policy of equal opportunity:
1) The management shall inform all employees in writing - in translation, if required - on the content of this works agreement.
2) In order to realise equal opportunities, aims and measures shall be fixed for the areas of employment, treatment in the workplace, access to training, further education and training, professional promotion and the allocation of company housing, and their implementation shall be monitored.
3) The entire responsibility for the implementation of the company policy of equal opportunity is borne by the management of the company _____. A commission on equal terms shall be formed from representatives of the company _____ and the workers' council which shall be responsible for the exercising of duties resulting from this works agreement. The progress which is to be registered through the implementation of the aims determined for equal opportunity shall be monitored by this commission and the existing deficits shall be identified.
4. Evaluation of the effectiveness of the policy of equal opportunity

[43] Own translation, original text see http://www.igmetall.de/betriebsraete/betriebsvereinbarungen/

4.1
On the basis of the knowledge gained on still existent discrimination, the commission shall suggest the necessary measures to improve the situation to the employers.
4.2
The results of measures to implement equal opportunities are to be made known to the representatives of the employers (for example, in meetings of works councils, via the company newsletter and other publications).
5. Employment of staff
5.1
In a job advertisement posted within the company, it is to be ensured that this advertisement appears in the main languages represented in the company and that it can be read by workers with a migrant background. In internal as well as external job offers, applicants with a migrant background are to be treated equally in line with the demands for qualifications.
5.2
In selection criteria and grouping, comparable qualifications and professional experience attained outside of Germany are to be considered appropriately. In selective tests, only those questions may be asked that result from the profile of the respective job.
5.3
In interviews, if so desired, members of the commission can also be invited to attend.
6. Allocation of duties and professional promotion/ equal treatment of migrant workers in cases of a change in the organisation of work
6.1
Personnel managers and company heads who make decisions regarding the allocation of duties and their respective areas as well as the selection of those who take part in further education and training measures are to apply their criteria in the spirit of this works agreement. It may not be assumed that certain tasks are 'reserved' for members of specific ethnic groups. In the case of a shift in duties which belong to a higher pay bracket or in cases where participation in on-the-job training takes place, members of ethnic minorities may not be excluded or disadvantaged.
6.2
The evaluation of achievement and professional promotion shall take place according to uniform criteria. Employees with a migrant background are to be treated in the same way as all other employees in the allocation of new duties and workplaces which especially result from changes in the organisation of work. The organisation and structure of work may not be lead to a reduction in the proportion of migrant workers in the total number of employees.
7. Training, further education and training / support measures
7.1
In the evaluation of applications for apprenticeships, the national or ethnic origin shall be disregarded. It shall be ensured by appropriate measures (by information in the applicants' native tongue, if required) that sufficient information is supplied to the higher classes at school regarding future-oriented professions, that places are allocated for work experience and, in co-operation with the career advisory services, if required, specific professional training is fostered for young migrants.
7.2
It shall be ensured that all measures for training, further education and training carried out by the company _____ shall be made known to all employees, irrespective of their origin. Further training and qualification measures are to be co-ordinated in such a way that appropriate duties are offered within the framework of the qualification.

7.3
The members of ethnic and national minorities shall be encouraged and supported by the company (through appropriate information campaigns, in workers' meetings or by offers of subject-related language teaching) to utilise the opportunities for further training, especially those which facilitate entry to those areas of work in which they are underrepresented.
8. Allocation of company housing
It is to be ensured that in allocating or procuring company housing that employees with a migrant background are treated in the same way as all other employees. More precise details can be regulated in a specific works agreement.
9. Complaints procedure / Measures in the case of discrimination against employees with a migrant background
Possible complaints regarding discrimination against employees with a migrant background are to be dealt with immediately. The manager or personnel manager responsible shall pursue the complaint and immediately report their resolution to the commission.
10. Evaluation
Attempts should be made to evaluate the company policies on anti-discrimination and equal treatment in the sense of the 'Joint Statement on the Prevention of Racial Discrimination and Xenophobia as well as the Promotion of Equality in the Workplace' as passed at the Summit on Social Dialogue on 21 October, 1995 in Florence [own translation].
The publication of this evaluation should be attempted with the help of financial support from the European Commission.
Closing statement
This works agreement becomes effective from _____ and may be terminated at the earliest after three years.

Signed for the Management Signed for the Workers' Council

Enclosures

Please send this form for information purposes to:

IG Metall Vorstand
Abt. Ausländische Arbeitnehmer
Lyoner Str. 32

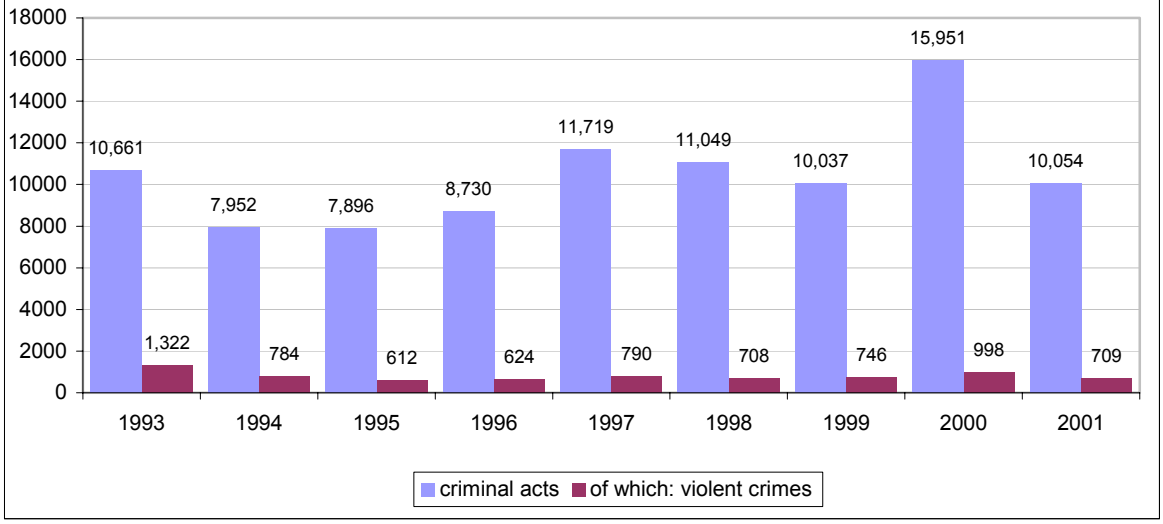
60519 Frankfurt/Main

REPORT FORM

Between the company _____ and the workers' council, a works agreement has been entered into 'for the combating and eradication of discrimination against migrant employees and fostering equality in the workplace'.

Annex IV- Development of extreme right-wing, xenophobic and anti-Semitic criminal acts and violent crimes since the 1990s

Diagram 1: Extreme right-wing, xenophobic and anti-Semitic criminal acts 1993-2001[1]



Source: Bundesamt für Verfassungsschutz (Federal Office for Internal Security) 2001a, www.verfassungsschutz.de/news
1) Annotation: Due to the introduction of a new registration system at the beginning of 2001 the figures of 2001 cannot be compared with the previous years.

Diagram 1 illustrates that the number of criminal acts with extreme right-wing background has risen again, since the calming of the situation in the mid-nineties, to over 10,000 criminal acts per year since 1997, culminating in 2000 with almost 16,000 crimes. This is based on the figures provided by the Criminal Investigation Registration Service. (The figures provided by the Police Crime Statistics - State Security (PKS-S) reveal smaller values due to retrospective corrections.)

It should be noted here that the *total* number of crimes in this area are given; the *violent* crimes[44] in total only constitute since 1995 a proportion of some 6-8% of them. Due to the increase in Internet criminality (so-called 'propaganda crimes'), the number of 'minor' crimes in particular has increased proportionally in recent years. In contrast, the number of violent offences reached its peak in 1992 and 1993. At the onset of the massive xenophobic riots at that time, which were also reported internationally (Hoyerswerda, Rostock-Lichtenhagen, Mölln, Solingen), particularly asylum seekers and former

[44] The violent crimes include, apart from attacks against persons (completed and tried killings, bodily harm), also wrongful detention, blackmail, breach of the peace as well as arson and explosions. However, wilful damage of property, intimidation and threatening (next to propaganda crimes and incitement of the people) are part of other crimes.

contracted workers of the GDR in the new federal states were affected. Parallel to the reduction in the numbers of asylum seekers since 1994, although the attacks against this group have also reduced, extreme right-wing and xenophobic attitudes have become established amongst a milieu with a propensity for violence[45]. Compared to the previous years, however, a significant increase in violent crimes to almost 1,000 violent crimes in 2000 has to be stated, with three completed murders among them.[46]

[45] The Report on the Protection of the Constitution 2001 mentions about 10,400 extreme right-wingers in Germany as a whole with a readiness for violence.

[46] One of the three victims, a family dad from Mozambique, was slain by three neo Nazis with racist motives in June 2000. The perpetrators were found guilty of joint murder on August 30, 2000. The principal defendant was sentenced to a life imprisonment, the other two perpetrators were sentenced to nine years youth detention each.

Annex V - Background information on national minorities in Germany

In Germany, national minorities are those groups of German citizens who are traditionally resident in the Federal Republic of Germany and live in their traditional/ancestral settlement areas, but who differ from the majority population through their own language, culture and history - i.e. an identity of their own - and who wish to preserve that identity. These are: the Danish minority, the Sorbian people, the Friesians in Germany, and the German Sinti and Roma. It is to be noted, however, that the Sinti and Roma more or less live in all parts of Germany, mostly in rather small numbers. The Danes, the members of the Sorbian people, and the German Sinti and Roma are designated as national minorities, while the term of "Friesian ethnic group" reflects the wish of the large majority of Friesians not to be classed as a national minority, but as a Friesian ethnic group (cf. Bundesregierung 1999, p. 17).

As statistical data based on ethnic criteria are not gathered in Germany, the number of members of the national minorities can only be estimated. In addition, it is considered a personal decision whether an individual belongs to one of those groups, which consequently is neither registered, reviewed or contested by the German state (cf. Bundesregierung 1999, p. 18).

THE DANISH MINORITY

The number of members of the Danish minority living in the Schleswig region of the Land of Schleswig-Holstein is estimated at some 50,000 persons.

THE SORBIAN PEOPLE

The number of persons who consider themselves Sorbs is not known. The estimated number is about 60,000 Sorbs, of whom two thirds live in Saxony, and one third in Brandenburg. In some local communities, the majority of the inhabitants are Sorbs. Approximately 35,000 Sorbs have a command of written and spoken Sorbian; all Sorbs speak German as well.

THE ETHNIC GROUP OF FRIESIANS

About 60,000 to 70,000 persons consider themselves Friesians on account of their ethnic descent and their sense of personal identity. They are living in the North Sea region of the federal states of Lower-Saxony and Schleswig-Holstein.

THE GERMAN SINTI AND ROMA

In 1997 German Sinti and Roma were recognised as a national minority. The German Sinti and Roma are estimated to number up to 70,000 persons. Some of the Sinti organisations put the numbers even higher (between 150,000 and 200,000). The majority of the German Sinti and Roma live in the big cities of the „old federal states“ including Berlin. The German Sinti and Roma only represent a small, not quantifiable, share of the population in all of their settlement areas. The Romany spoken by the German Sinti and

Roma is the language of those members of this national minority who traditionally live in Germany.

Moreover it is estimated, that up to 100,000 Roma who do not possess the German citizenship reside in Germany (which are not part of the national minority). Among these, the majority are Romani refugees from southeastern Europe, very few of whom have been awarded a permanent resident status. The total Sinti and Roma population constitutes only a small percent of the total population of approximately 82 million (cf. Open Society Institute 2002, p. 146).

MINORITY RIGHTS

With the ratification of the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional and Minority Languages (CRML), Germany undertook an obligation to support the right of its four recognised minority groups (Danes, Friesians, Sinti/Roma, and Sorbs) to maintain and foster their identity, language and culture. However, Sinti and Roma often face serious obstacles to enjoyment of these rights in practice.

The FCNM (in force since 1998) and the CRML (in force since 1999) are subordinate to the Basic Law, although as Federal laws they take precedence over state laws, and as the more specific laws override other Federal laws.

Aside from these conventions, there is no specific Federal legislation stipulating the rights of minorities, with the exception of the Declaration on the Rights of the Danish Minority of 29 March 1955. On the basis of this declaration the *Südschleswigsche Wählerverband SSW* (Electoral association of Southern Silesia) is exempted from the 5% clause, which is obligatory for political parties to enter the state parliament. In addition, the German Danes run schools and kindergartens of their own.

Provisions on the Federal level cited as applicable for minority protection in the State FCNM Report (1999) are Article 2 of the Basic Law, which guarantees the right to personal self-fulfilment, and Article 3, which bans discrimination by State agencies. The leader of the Central Council for German Sinti and Roma has demanded that minority rights protection should be written into the Basic Law, but no such initiative is intended.

Legislation on cultural matters, including language and education, is a prerogative of the federal states. As of August 2002, only five of 16 states had adopted legislative provisions regarding minority protection: Article 25 of the Constitution of Brandenburg, Article 18 of the Constitution of Mecklenburg-West Pomerania, Articles 5.2 and 6 of the Constitution of Saxony, Article 37.1 of the Constitution of Saxony-Anhalt, and Article 5 of the Constitution of Schleswig-Holstein. In addition, the school laws of Brandenburg and Saxony make it possible for Sorbian pupils to learn the Sorbian language[47]. None of these articles specifically mentions Sinti and Roma, although the other three recognised minority groups (Danes, Friesians, and Sorbs) are specifically mentioned in the legislation of the states in which individuals belonging to these groups reside. “Given the federal structure of Germany and the fact that the Sinti and Roma population is widely dispersed throughout the country, international legal experts have recommended the

[47] At the moment 74 public schools offer the Sorbian language as a school subject.

adoption of public law agreements between minority organisations and the Government as a means of ensuring specific and enforceable minority rights for German Sinti and Roma" (cf. Open Society Institute 2002, p. 202).